

**The Trade, Development and Cooperation Agreement  
between  
the Republic of South Africa and the European Union:**

**An analysis with special regard to  
the negotiating process, the contents of the agreement, the  
applicability of WTO law and the Port and Sherry  
Agreement**

by

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## **DECLARATION**

I, the undersigned, hereby declare that the work contained in this thesis is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.



## **Abstract**

This thesis deals with the Trade, Development and Cooperation Agreement (TDCA) between the European Union and the Republic of South Africa, which was concluded in October 1999. In particular, the agreement is analysed in the light of the negotiating process between the parties, the contents of the agreement, the applicability of WTO law and the compatibility of the agreement with it and the Port and Sherry Agreement.

Since the EU emphasised its aim to commence economic and development cooperation with other African, Caribbean and Pacific (ACP) countries on a reciprocal basis during the negotiations for a successor of the Lomé Convention, the TDCA between the EU and South Africa had to be seen as a "pilot project" for future cooperation agreements between countries at different levels of development. The TDCA between the EU and South Africa is therefore not only very important for the two concerned parties, but could serve as an example for further negotiations between the EU and other ACP countries. Thus the purpose of this thesis is to examine the TDCA between the EU and South Africa from a wider global perspective.

The thesis is divided into six Chapters:

The first Chapter provides an introduction to the circumstances under which the negotiations between the EU and South Africa commenced. It deals briefly with the economic situation in South Africa during the apartheid era and presents reasons why the parties wanted to enter into bilateral negotiations. The introductory part furthermore presents an overview of the contents of the thesis.

The second chapter contains a detailed description of the negotiating process that took place between the parties and shows why it took 43 months and 21 rounds of negotiations to reach a deal. South Africa's partial accession to the Lomé Convention and the conclusion of separate agreements such as the Wine and Spirits Agreement, are also analysed.



Chapter three presents the various components of the TDCA and illustrates what the negotiators achieved. This chapter on the TDCA concludes with an evaluation of the Agreement and shows the potential benefits to South Africa and the EU.

Since the Agreement had to satisfy international rules, the provisions of the General Agreement on Tariffs and Trade/World Trade Organisation (GATT/WTO) were of major importance. The EC Treaty, however, does not contain any provision that indicates whether, or how, an international agreement like the GATT/WTO penetrates the Community legal order. In Chapter four, accordingly, questions are raised regarding the extent to which the bilateral agreement between South Africa and the EU was influenced by the GATT/WTO provisions and how these rules were incorporated into the agreement. Furthermore, since the parties agreed on the establishment of a free trade area, this chapter deals with the question of in how far the TDCA is in line with Article XXIV GATT.

In addition to the GATT provisions, the TDCA is also affected by the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs). Therefore Chapter five deals with TRIPs in connection with the TDCA. The use of the terms "Port" and "Sherry" as the major stumbling block to the conclusion of the TDCA is analysed more closely.

The final part, namely Chapter six, provides a summary of the results of the investigation. Furthermore, a conclusion is provided with regard to the question of whether the TDCA can be seen as an example for further trade relations between the EU and other ACP countries.



## **Opsomming**

Hierdie tesis is gerig op die Handels-, Ontwikkelings- en Samewerkingsooreenkoms (TDCA) tussen die Europese Unie (EU) en die Republiek van Suid Afrika wat in Oktober 1999 gesluit is. Die ooreenkoms word veral in die lig van die onderhandelingsproses tussen die partye, die inhoud van die ooreenkoms, die toepaslikheid van Wêreldhandelsorganisasiereg en die versoenbaarheid daarvan met die ooreenkoms en die Port en Sjerrie-ooreenkoms ontleed.

Aangesien die EU sy oogmerk van wederkerige ekonomiese en ontwikkelings-gerigte samewerking met ander lande in Afrika en die Karibiese en Stille Oseaan-Eilande gedurende die onderhandelings vir 'n opvolger van die Lomé Konvensie beklemtoon het, moes die ooreenkoms tussen die EU en Suid-Afrika as 'n "loodsprojek" vir toekomstige samewerkingsooreenkomste tussen lande wat op verskillende vlakke van ontwikkeling is, gesien word. Die Handels-, Ontwikkelings- en Samewerkingsooreenkoms tussen die EU en Suid-Afrika is dus nie net baie belangrik vir die betrokke partye nie, maar dit kan ook as 'n voorbeeld vir verdere onderhandelings tussen die EU en lande van Afrika en die Karibiese- en Stille Oseaan-Eilande dien. Die doel van dié tesis is om die Handels-, Ontwikkelings- en Samewerkingsooreenkoms tussen die EU en Suid-Afrika vanuit 'n meer globale perspektief te beskou.

Die tesis is in ses Hoofstukke ingedeel:

Die eerste hoofstuk bied 'n inleiding tot die omstandighede waaronder die onderhandelings tussen die EU en Suid-Afrika begin het. Dit behandel die Suid-Afrikaanse ekonomiese situasie onder apartheid kortliks en toon hoekom die partye tweesydigse onderhandelings wou aanknoop. Verder bied die inleidende deel 'n oorsig oor die inhoud van die tesis.

Die tweede hoofstuk bevat 'n gedetailleerde beskrywing van die onderhandelingsproses wat tussen die partye plaasgevind het en toon aan waarom dit drie-en-veertig maande geduur het en een-en-twintig onderhandelingsrondes gekos het om die saak te beklank. Suid-Afrika se gedeeltelike toetrede tot die Lomé



Konvensie en die sluit van aparte ooreenkomste soos die Port- en Sjerrie-ooreenkoms word ook ontleed.

Die daaropvolgende hoofstuk bespreek die verskillende komponente van die Handels-, Ontwikkelings- en Samewerkingsooreenkoms en toon wat die onderhandelaars bereik het. Hierdie hoofstuk oor die Ooreenkoms sluit af met 'n evaluering daarvan en dui die potensiele voordele van die Ooreenkoms vir Suid-Afrika en die EU aan.

Aangesien die Ooreenkoms internasionale reëls moes tevrede stel, was die voorskrifte van die Algemene Ooreenkoms oor Tariewe en Handel (GATT) van uiterste belang. Die EG-verdrag bevat egter geen voorskrif wat aandui óf, of hoé, 'n internasionale ooreenkoms soos GATT/WTO die regsorde van die Europese Gemeenskap binnedring nie. Die vraag oor in hoeverre die tweesydige ooreenkoms tussen Suid-Afrika en die EU deur die GATT/WTO voorskrifte beïnvloed is, en oor hoe hierdie reëls in die ooreenkoms opgeneem is, word dus in Hoofstuk vier aangeraak. Aangesien die partye ooreengekom het om 'n vrye handelsarea tot stand te bring, behandel hierdie hoofstuk ook die vraag oor in hoeverre die TDCA met Artikel XXIV GATT strook.

Tesame met die GATT-voorskrifte word die TDCA ook deur die Ooreenkoms ten opsigte van Handelsverwante Aspekte van Intellektuele Eiendomsreg (TRIPs) geraak. Hoofstuk vyf behandel daarom hierdie aspek ten opsigte van die TDCA. Die gebruik van die terme "Port" en "Sjerrie" as die vernaamste struikelblok tot die sluiting van die TDC-ooreenkoms word ook deegliker ontleed.

Die laaste gedeelte, naamlik Hoofstuk ses, bied 'n opsomming van die resultate van die ondersoek. Verder word 'n gevolgtrekking voorsien ten opsigte van vraag of die TDCA as 'n voorbeeld vir verdere handelsverwantskappe tussen die EU en ander lande in Afrika en die Karibiese en Stille Oseaan-eilande beskou kan word.



<b>1. INTRODUCTION .....</b>	<b>4</b>
<b>2. HISTORICAL DEVELOPMENT OF THE POST-APARTHEID COOPERATION BETWEEN THE RSA AND THE EU .....</b>	<b>12</b>
2.1 THE PRELUDE TO THE SOUTH AFRICAN - EUROPEAN UNION NEGOTIATIONS .....	12
2.1.1 <i>Package of immediate measures in April 1994 .....</i>	12
2.1.2 <i>Interim Cooperation Agreement in October 1994.....</i>	15
2.1.3 <i>Conclusion .....</i>	16
2.2 SOUTH AFRICA AND THE LOMÉ CONVENTION.....	17
2.2.1 <i>The South African request for a Lomé-minus membership .....</i>	17
2.2.2 <i>Background to the Lomé Convention .....</i>	18
2.2.3 <i>Reasons for South Africa's request for Lomé-minus membership .....</i>	20
2.2.3.1 <i>Implementation within a relatively short term.....</i>	20
2.2.3.2 <i>Non-reciprocity and best preferential market access .....</i>	21
2.2.3.3 <i>Facilitation of regional integration .....</i>	21
2.2.4 <i>EU's rejection of South Africa's request .....</i>	22
2.2.4.1 <i>South Africa's status as a developed country.....</i>	22
2.2.4.2 <i>Criticism from other WTO Members .....</i>	24
2.2.4.3 <i>Negative impact on the ACP countries .....</i>	24
2.2.4.4 <i>Fear of competition.....</i>	25
2.2.5 <i>Evaluation of South Africa's request to enter the Lomé Convention and of the EU's rejection thereof.....</i>	26
2.3 START OF NEGOTIATIONS FOR A LONG-TERM FRAMEWORK OF COOPERATION .....	28
2.3.1 <i>Declaration of Intent of May 1995 .....</i>	28
2.3.2 <i>The EU two-track proposal in June 1995 and the official opening of the negotiations .....</i>	29
2.3.3 <i>Technical discussions .....</i>	30
2.3.4 <i>The second EU mandate in March 1996.....</i>	32
2.3.4.1 <i>The contents of the EU offer.....</i>	33
2.3.4.2 <i>Evaluation of the EU offer.....</i>	35
2.4 SOUTH AFRICA'S COUNTERPROPOSAL .....	37
2.4.1 <i>The development of the proposal.....</i>	37
2.4.2 <i>The objectives of an agreement.....</i>	37
2.4.3 <i>SACU submission .....</i>	39
2.5 TRADE AND DEVELOPMENT AGREEMENT.....	40
2.6 COUNCIL REGULATION ON DEVELOPMENT COOPERATION WITH SOUTH AFRICA .	41
2.7 SCIENCE AND TECHNOLOGY AGREEMENT OF DECEMBER 1996 .....	42
2.8 THE PROGRESS OF NEGOTIATIONS FROM JANUARY 1997 TO MARCH 1997 .....	43
2.9 SOUTH AFRICA'S ACCESSION TO THE LOMÉ CONVENTION IN APRIL 1997 .....	44
2.9.1 <i>Qualified Membership .....</i>	45
2.9.2 <i>The legal basis of South Africa's accession to the Lomé Convention .</i>	45
2.9.3 <i>Main terms and conditions of South Africa's accession to the Lomé Convention .....</i>	46
2.9.3.1 <i>Articles applicable to South Africa .....</i>	46
2.9.3.2 <i>Articles not applicable to South Africa .....</i>	46
2.10 THE CONTINUATION OF NEGOTIATIONS ON THE TDCA IN OCTOBER 1997 .....	48
2.11 THE PROVISIONAL ENTRY INTO FORCE OF THE TDCA AND THE CONTINUOUS NEGOTIATIONS ON THE WINE AND SPIRITS AGREEMENT .....	49
2.12 THE EXPIRY OF THE LOMÉ CONVENTION AND THE CONCLUSION OF THE COTONOU AGREEMENT.....	53
2.13 CONCLUSION.....	57



<b>3. THE TRADE, DEVELOPMENT AND COOPERATION AGREEMENT.....</b>	<b>59</b>
3.1 THE COMPONENTS OF THE AGREEMENT.....	59
3.1.1 <i>Political Dialogue</i> .....	59
3.1.2 <i>Provisions for a Free Trade Area</i> .....	61
3.1.2.1 General Features.....	61
3.1.2.2 Industrial Sector.....	65
3.1.2.3 Agricultural sector.....	67
3.1.2.3.1 Liberalisation of agricultural imports .....	68
3.1.2.3.2 Agricultural safeguard clause .....	69
3.1.3 <i>Trade related issues</i> .....	70
3.1.3.1 Customs Unions and FTAs.....	71
3.1.3.2 Antidumping and Countervailing measures .....	71
3.1.3.3 Safeguard measures .....	72
3.1.3.4 Used goods .....	73
3.1.3.5 Competition Policy .....	74
3.1.3.6 Public Aid.....	75
3.1.3.7 Dispute Settlement .....	77
3.1.4 <i>Economic Cooperation</i> .....	78
3.1.4.1 Industry.....	79
3.1.4.2 Investment promotion and protection.....	79
3.1.4.3 Information society.....	80
3.1.4.4 Other aspects of economic cooperation .....	80
3.1.5 <i>Development Cooperation</i> .....	80
3.1.5.1 General aims .....	81
3.1.5.2 Differentiation and Asymmetry.....	81
3.1.5.3 The European Programme for Reconstruction and Development ...	82
3.1.5.3.1 Basic social services .....	82
3.1.5.3.2 Private Sector Development.....	83
3.1.5.3.3 Good governance, democratisation and human rights .....	83
3.1.5.3.4 Regional cooperation .....	83
3.1.6 <i>Cooperation in social, cultural and other areas</i> .....	83
3.1.7 <i>Institutional provisions</i> .....	84
3.1.8 <i>Protocol on the Rules of Origin</i> .....	85
3.1.8.1 South African or EU origin .....	85
3.1.8.2 Cumulation of origin.....	86
3.1.8.3 List rules .....	88
3.1.8.4 Value tolerance rule.....	88
3.1.8.5 Fishery products .....	89
3.1.9 <i>Sectoral agreements</i> .....	89
3.1.9.1 The Fishing Agreement .....	89
3.1.9.2 The Wine and Spirits Agreement.....	90
3.2 EVALUATION OF THE TDCA .....	92
<b>4. THE STATUS OF INTERNATIONAL AGREEMENTS AND OF THE GATT /</b>	
<b>WTO PROVISIONS AND THE CONSEQUENCES FOR THE TDCA .....</b>	<b>97</b>
4.1 THE STATUS OF INTERNATIONAL AGREEMENTS AND THE GATT / WTO PROVISIONS	98
4.1.1 <i>International agreements in EU law</i> .....	98
4.1.1.1 The Haegeman case .....	98
4.1.1.2 The Kupferberg case .....	99
4.1.1.3 The Demirel case.....	100



4.1.1.4	The Sevince case .....	101
4.1.1.5	Conclusion.....	102
4.1.2	<i>The GATT / WTO provisions in EU law</i> .....	103
4.1.2.1	The International Fruit Company case.....	104
4.1.2.2	The Nederlandse Spoorwegen case.....	106
4.1.2.3	The SIOT case and the SPI/SIAMI case.....	107
4.1.2.4	The WTO Agreement.....	108
4.1.2.4.1	WTO Membership of the European Community plus its Member States and its consequences.....	109
4.1.2.5	Conclusion.....	111
4.1.3	<i>The GATT / WTO provisions in South African law</i> .....	112
4.2	COMPATIBILITY OF THE TDCA WITH THE WTO LAW.....	115
4.2.1	<i>The Most-Favoured-Nation Obligation</i> .....	115
4.2.1.1	Part IV of the GATT .....	116
4.2.1.2	Differentiation .....	117
4.2.1.3	Waiver of the WTO/GATT obligations.....	119
4.2.1.4	Regional trade arrangements under Article XXIV GATT.....	120
4.2.1.4.1	Requirements of a Free Trade Area and a Customs Union .....	121
4.2.1.4.1.1	"Substantially all trade".....	122
4.2.1.4.1.2	"Within a reasonable length of time".....	123
4.2.1.4.1.3	Approval by the contracting parties of the WTO.....	125
4.2.1.4.2	Conclusion .....	126
4.2.2	<i>Disputes concerning regional interests</i> .....	127
4.2.2.1	Southern African Customs Union.....	128
4.2.2.2	Southern African Development Community.....	132
5.	<b>INTELLECTUAL PROPERTY RIGHTS</b> .....	135
5.1	BACKGROUND .....	135
5.2	AGREEMENT ON TRADE-RELATED INTELLECTUAL PROPERTY RIGHTS AND THE TDCA .....	137
5.3	PORT AND SHERRY IN THE CONTEXT OF TRIPS .....	137
5.3.1	<i>Article 23 TRIPs</i> .....	138
5.3.2	<i>Article 22 TRIPs</i> .....	138
5.3.3	<i>Article 24 TRIPs</i> .....	140
5.4	PORT AND SHERRY IN THE CONTEXT OF THE TDCA .....	142
5.5	EVALUATION OF THE PORT AND SHERRY COMPROMISE.....	143
6.	<b>CONCLUSION</b> .....	146
	GLOSSARY .....	Error! Bookmark not defined.
	APPENDIX .....	Error! Bookmark not defined.
	Appendix 1: Article 19 (1) of the SACU agreement.....	Error! Bookmark not defined.
	Appendix 2: 1997 - 1999 Multi-annual Indicative Programme ...	Error! Bookmark not defined.
	Appendix 3: EU grants under the EPRD on a yearly basis .....	Error! Bookmark not defined.
	Appendix 4: Coverage of the Free Trade Area .....	Error! Bookmark not defined.
	Appendix 5: Exclusion of sensitive products.....	Error! Bookmark not defined.
	Appendix 6: Partial liberalisation of products .....	Error! Bookmark not defined.
	Appendix 7: Protocol 3 of the Cotonou Agreement.....	Error! Bookmark not defined.
	BIBLIOGRAPHY .....	Error! Bookmark not defined.
	INTERNET PUBLICATIONS .....	Error! Bookmark not defined.
	CASES .....	Error! Bookmark not defined.



INTERNATIONAL AGREEMENTS AND LEGISLATION ..... **Error! Bookmark not defined.**

INTERVIEWS ..... **Error! Bookmark not defined.**

## 1. Introduction

The fall of the Berlin Wall in 1989 and the subsequent end of the Cold War saw changing perceptions in the realm of international affairs. Significantly, international economic activities increased and governments tried to promote this development by lowering trade barriers between their countries. The reason behind this was the conviction among international economists that freer trade increases the amount of existing goods that are traded, diversifies economic links, promotes lasting development and thus ultimately improves welfare.<sup>1</sup>

Due to its Apartheid regime, South Africa, especially, was economically isolated from both its immediate neighbours and the world at large. The European Community (EC<sup>2</sup>), for example, adopted a number of restrictive measures in 1985 and 1986, because of the aggravating political situation in South Africa. In 1985 the restrictive measures included military sanctions such as an embargo on the import and export of arms and paramilitary equipment, the refusal to cooperate militarily, and the removal of EC military attaches. Furthermore, the cessation of oil exports to South Africa, the prohibition of new collaboration in the nuclear sector and the ban on export of sensitive equipment for security purposes were agreed upon. In 1986 the EC adopted further measures to put more pressure on South Africa. These were a partial ban on steel and iron imports from South Africa and the suspension of new direct investment in South Africa, as well as the suspension of the import of gold

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<sup>1</sup> Jackson *The World Trading System - Law and Policy of International Economic Relations* (1998) 11-21.

<sup>2</sup> In the following the terms European Community (EC) and European Union (EU) are used. Until the entry into force of the Treaty of the European Union (TEU) in November 1993, the term (European Community) was, as a matter of convention, employed to describe those twelve member states that constituted three distinct communities. Those were: the European Coal and Steel Community (ECSC), Euratom and the European Economic Community (EEC). Since that date, these three communities together form a part of a broader entity called the "European Union" (EU). The EU consists of three main pillars: the first pillar is made up of the three communities (each now comprising fifteen Member States); the second pillar relates to the cooperation in the field of Common Foreign and Security policy (CFSP); and the third pillar relates to the cooperation in the field of Justice and Home Affairs (CJHA). See Jackson *The World Trading System* (1998) 359. In this dissertation the term "EU" is used in respect of the post-1993 period. The term "EC" is used in respect of the pre-1993 period or when referring to a specific competence that does not extend to the broader European Union but rather involves the European Community alone. Given that commercial policy forms part of the first pillar, the term "EC" will consistently be used for the term European Community.



coins from South Africa.<sup>3</sup> However, during this period the EC, in handling 38 % of the South African imports and 21% of its exports, was still the country's most important trading partner.<sup>4</sup>

From February 1990, after the De Klerk Government began to introduce certain domestic reforms, including the release of Nelson Mandela, the lifting of the state of emergency, and the abolition of apartheid legislation, the EC policy towards South Africa started to change and various measures prohibiting trade with South Africa were repealed.<sup>5</sup> With the first democratic elections in April 1994 and the installation of the country's first democratic order, years of boycott and sanctions came to an end. However, the isolation resulting from apartheid left the newly elected Government of National Unity with empty hands regarding international agreements, both in the trade and the cooperation spheres. Consequently Pretoria had to reposition and to reintegrate South African economy within the global economy.<sup>6</sup>

In the process of restructuring its trade and industrial policies one of the challenges the new government was faced with were the negotiations over the conclusion of a Trade, Development and Cooperation Agreement (TDCA) with the European Union (EU). As in the 1980s, trade relations with the EU were still of vital importance to the South African economy. With a trade volume between the parties estimated at about 18 billion Euro (€) a year, accounting for over 40% of South Africa's imports, close to 40% of its exports and over 70% of direct investment, the EU has consistently been South Africa's largest trading partner and market access to the EU has therefore

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<sup>3</sup> European Parliament-Barbara Simons *Bericht im Namen des Ausschusses für Außenwirtschaftsbeziehungen über die Inkraftsetzung der wirtschaftsbeschränkenden Maßnahmen gegen die Republik Südafrika durch die Mitgliedstaaten der Gemeinschaft* (1987) 11-26.

<sup>4</sup> Other important export markets for South African products were Japan (8,75%), the United States of America (6,9%) and Switzerland (5,3%). See EU COM *Handelsbeziehungen zur Republik Südafrika – Antwort von Herrn De Clercq im Namen der Kommission* (1986) 3-5. For an overview of the trade between the EC and South Africa from 1983 until 1986 see European Parliament-Barbara Simons *Bericht im Namen des Ausschusses für Außenwirtschaftsbeziehungen* (1987) 22.

<sup>5</sup> EU COM *Südafrika und die Europäische Gemeinschaft: Leitlinien für eine Politik zur Unterstützung des Übergangs zur Demokratie-Mitteilung der Kommission an den Rat* (1993) 3. The EC lifted the ban on investments, repealed the regulation suspending import of gold coins and the decision suspending imports of certain iron and steel products originating in South Africa. It was also decided to lift the oil embargo.

<sup>6</sup> Graumans "The European Union-South Africa negotiations: the sting is in the tail" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 4 at [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).



been of specific interest for South Africa.<sup>7</sup> However, the negotiating process for the new trade partnership could only be finalised after 43 months and 21 rounds of negotiations during the course of 1999 - 2000.<sup>8</sup> Philip Lowe, the European Chief Negotiator, described the negotiations as the toughest and meanest the EU had ever led<sup>9</sup>, and many reasons could be given why it took the parties so long to reach a deal. But one must bear in mind that the TDCA between the EU and South Africa was not only drafted according to bilateral needs but also to meet international rules. Therefore the TDCA has to be looked at from a global perspective and other circumstances have to be taken into consideration.

During the same period negotiations regarding future trade relations between the EU and the 70 countries of Africa, the Caribbean and the Pacific (ACP) were under discussion.<sup>10</sup> Under the Lomé Convention, which was the framework for trade and development ties between the EU and 70 ACP countries since 1975, standards of living in the ACP countries have improved markedly in terms of health, education and access to essential services, but the overall situation during this time was still critical: 41 of the 50 least-developed countries were ACP countries.<sup>11</sup> For this reason, the European Commission thought that the forthcoming institutional milestone in ACP-EU cooperation would be the right occasion for a detailed review and frank and substantial debate on the future of these ties.<sup>12</sup>

Under these circumstances the TDCA as the first Free Trade Agreement between the EU and a country, which can in certain terms be qualified as a developing country,<sup>13</sup> had to be seen as a "pilot project" for future cooperation and trade agreements between developed and developing countries. Therefore the negotiations between the EU and South Africa were not only of enormous significance for the concerned

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<sup>7</sup> EU COM *Partners in Progress-The EU / SA TDCA for the 21<sup>st</sup> century* (1999) 7.

<sup>8</sup> EU COM *Partners in Progress* (1999) 39.

<sup>9</sup> EU COM *Partners in Progress* (1999) 40.

<sup>10</sup> The Lomé Convention came to an end on 29 February 2000 and negotiations between the Contracting Parties should start eighteen months before that date, namely in September 1998.

<sup>11</sup> EU COM *Green Paper on relations between the European Union and the ACP countries on the eve of the 21<sup>st</sup> century - Challenges and options for a new partnership* (1996) 1.

<sup>12</sup> EU COM *Green Paper* (1996) 2.

<sup>13</sup> South Africa's status as a developed or as developing country is discussed in Chapter 2.2.4.1; Stevens & Kennan *Trade between South Africa and Europe: Future prospects and policy choices* (1995) 26.



parties but also for all other African, Caribbean and Pacific countries that might have to negotiate their trade relations with the European Union in the future. Of course, 18 months after the entry into force of the agreement it is still too early to give a concrete analysis of the advantages and disadvantages of the TDCA for the economic situation in the EU and South Africa. Nevertheless, the demanding negotiation process between the EU and South Africa, various issues arising between the parties and, finally, the results of the negotiations, are of enormous interest and could serve as an important example for future trade relations between the EU and other ACP states.

Thus the purpose of this dissertation is to reflect these concerns and to view the TDCA between the EU and South Africa from a global perspective. The dissertation is divided into six chapters.

Chapter two contains a detailed description of the historical development of the cooperation between South Africa and the EU, from the first democratic elections in 1994 to the most recent developments. Furthermore the European Programme for Reconstruction and Development (EPRD), the Science and Technology Agreement, the South African proposal for accession to the Lomé Convention, the EU's rejection thereof and its two-track approach will be examined. This chapter introduces the main issues of disagreement between the EU and South Africa and discusses the process of developing its negotiation mandate within the EU. It also presents South Africa's Trade and Development Agreement proposal, the beginning of detailed trade negotiations - especially in respect of the agreement on wines and spirits - and, finally, their conclusion in 1999.<sup>14</sup> This chapter will conclude with the conclusion of the TDCA, the conclusion of the Cotonou Agreement as the successor of the Lomé Convention in February 2000 and with the latest developments.

The TDCA does not consist of trade provisions only, but contains various other components. These are: political dialogue, the free trade area and trade-related issues between the two parties involved, economic and development cooperation, cooperation in social, cultural and other areas and an institutional provision.<sup>15</sup> In

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<sup>14</sup> The agreement on wines and spirits is still under discussion and has not been concluded yet. The parties expect its conclusion during the year 2001.

<sup>15</sup> EU COM *Agreement on Trade, Development and Cooperation between the European Community and its Member States on the one part, and the Republic of South Africa, on the other part* at



order to understand the contents and the legal aspects of the TDCA, each component will be presented in chapter three. Tables will show the percentage of the liberalisation of products between the EU and South Africa and illustrate how the TDCA will function. Furthermore the protocol on the rules of origin and the sectoral agreements on fishing and wine and spirits, which are part of the TDCA,<sup>16</sup> will be presented. This chapter on the TDCA will conclude with an evaluation of the Agreement showing the potential benefits to South Africa and to the EU.

Since the TDCA had to satisfy international rules, the provisions of the General Agreement on Tariffs and Trade (GATT) - trade regime were of major importance. The EU, in particular, repeatedly emphasised its determination that every accord had to be in line with the rules of the World Trade Organisation (WTO).<sup>17</sup> However, apart from article 300 (7) EC Treaty (ECT), which provides that international agreements are binding on the institutions and on the Member States, the EC Treaty does not contain any provision that indicates whether, or how, an international agreement like the GATT/WTO penetrates the Community legal order.<sup>18</sup>

In Chapter four, accordingly, the question of to what extent the bilateral agreement between South Africa and the EU was influenced by the GATT/WTO provisions and how these rules were incorporated into the agreement is raised. Does the European Court of Justice (ECJ) recognize the GATT/WTO provisions as such as a source of law, that is, do these provisions, as they stand, constitute a criterion of validity, or can they only be applied after having been transformed into a rule of Community law? How are the GATT/WTO provisions incorporated into the South African and the

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[www.europa.eu.int/eur-lex/de/lif/dat/1999/de\\_299A1204\\_02.htm](http://www.europa.eu.int/eur-lex/de/lif/dat/1999/de_299A1204_02.htm) (29.05.2000); EU COM *Partners in Progress* (1999) 5; Department of Trade and Industry *SA/EU Negotiations - Trade, Development and Cooperation Agreement* (1999) 8; Trade & Industry and Foreign Affairs Portfolio Committees Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement: Briefing at the Joint Meeting 17 September 1999* (1999) 4-10; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>16</sup> EU COM *TDCA between the EU and RSA* (1999) 37; [www.europa.eu.int/eur-lex/de/lif/dat/1999/de\\_299A1204\\_02.htm](http://www.europa.eu.int/eur-lex/de/lif/dat/1999/de_299A1204_02.htm) (29.05.2000).

<sup>17</sup> EU COM *Speech of Philip Lowe at the Conference of the South African Institute of International Affairs 2-3 September 1999: Assessing the EU - SA Agreement-Main parameters of the EU-SA partnership* (1999) at [www.europa.eu.int/comm/dg08/speeches.htm](http://www.europa.eu.int/comm/dg08/speeches.htm) (15.03.2001); Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 10; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).

<sup>18</sup> Bourgeois *The European Court of Justice and the World Trade Organisation: Problems and Challenges* in: Weiller (ed) *The EU, the WTO and the NAFTA - towards a common law of international trade* (2000) 77.



Community legal systems and in how far is the agreement in line with the GATT/ WTO provisions?

In an attempt to answer these questions, the status of an international agreement in general and of the GATT/WTO provisions, in particular, in the South African as well as the European Community legal systems, will firstly be examined.<sup>19</sup>

Secondly, since the TDCA provides a departure from the Most Favoured Nation obligation in favour of the EU and South Africa,<sup>20</sup> the compatibility of the TDCA with the GATT/WTO provisions has to be evaluated. In doing so, I consider the different possible legal grounds for the EU and South Africa to be excused from the GATT/WTO provisions.

These are: Part IV of the GATT and the Enabling Clause, which are designed for developing countries, a waiver from the GATT obligations under Article IX WTO, which can only be granted for any purpose by a 75% majority vote, and regional trade arrangements under Article XXIV GATT.<sup>21</sup> To be acceptable under Article XXIV GATT, the arrangement must cover "substantially all trade", must be completed within a "reasonable length of time" and all the WTO members must approve the agreement unanimously.<sup>22</sup> Differentiation based on development levels thus is possible.<sup>23</sup> However, the questions of under which exception the agreement between the EU and South Africa falls, and whether the different criteria are fulfilled, need to be answered here.

Apart from the fulfilment of the different criteria of Article XXIV GATT, one also has to bear in mind that the granting of favourable trade relations only between the EU and South Africa generates suspicion among neighbouring countries and other interested

<sup>19</sup> Due to a very wide field of legal problems the question of the status of an international agreement and of GATT has to be limited to the issue of direct applicability; following Eeckhout "The domestic legal status of the WTO Agreement: interconnecting legal systems" *The Common Market Law Review* (1997) 13, the question of the status of an international agreement includes the question whether the agreement can be directly effective or not. However, direct effect is not necessarily the only technique for answering the question of the legal status of an international agreement.

<sup>20</sup> Stevens & Kennan *Trade between South Africa and Europe* (1995) III.

<sup>21</sup> WTO *Trading into the future* (1998) 5-6.; WTO *Training package: GATS, Intellectual Property Rights, TRIPS* (1999) section A slide 4; Thomas "The Lomé Trade Regime and the World Trade Organization" *IGD Occasional Paper No 21* (1999) 5; Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 4; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).

<sup>22</sup> Jackson *The World Trading System* (1998) 165-166; Thomas "Lomé and the WTO" *IGD Occasional Paper No 21* (1999) 5;

<sup>23</sup> Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 4; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).



third parties that the FTA may have adverse effects on their trade. Most countries in the Southern African region have entered into formal trade relations with South Africa under the Southern African Development Community (SADC) Agreement and some are even more closely bound as members to the Southern African Customs Union (SACU). Due to these strong and longstanding trade relations between the Southern African countries, there is fear among these countries that the EU-SA FTA may have a negative impact on their trade relations with either party of the TDCA and may lead to disputes concerning their regional interests. Thus, it further is necessary to assess, in this chapter, in how far the EU-SA FTA could have a negative impact on neighbouring countries and whether these countries could institute, if the occasion arises, any WTO dispute settlement proceedings against either party of the TDCA.

In addition to the GATT/WTO provisions, the TDCA is also touched on by the Agreement on Trade Related Intellectual Property Rights (TRIPs). As an integral part of the WTO, the protection of TRIPs is guaranteed within the TDCA in terms of article 46 TDCA.<sup>24</sup> Therefore it is binding on the EU and South Africa. However the use of the brand names "Port" and "Sherry" by local producers in South Africa and the EU led to substantial disagreement between the parties. The EU maintained that "Port" and "Sherry" are "geographical indications" which need to be protected under the TRIPs agreement as they related to certain places in Portugal and Spain. Therefore the EU voiced its determination to reach an agreement that would stop South African producers of fortified wines from using those names.<sup>25</sup> After four years of tough negotiations South Africa agreed in bilateral commitment to phase out the respective terms on the domestic and the export market.<sup>26</sup>

Nevertheless the question remains if there was a legal obligation to do so under TRIPs. As a way of answering this question, chapter five deals with the trade-related aspects of intellectual property rights in connection with the bilateral agreement

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<sup>24</sup> WTO TRIPs: *Frequently asked questions* at [www.wto.org/english/tratop\\_e/trips\\_etripfq\\_e.htm](http://www.wto.org/english/tratop_e/trips_etripfq_e.htm) (15.03.2001); Hoekman/Kostecki *The political economy of the world trading system – from GATT to WTO* (1998) 148; [www.europa.eu.int/eur-lex/de/lif/dat/1999/de\\_299A1204\\_02.htm](http://www.europa.eu.int/eur-lex/de/lif/dat/1999/de_299A1204_02.htm) (29.05.2000).

<sup>25</sup> European Information Service *EU/SA Africa Trade Pact deadline missed, Vienna Summit admits* (1998) at [www.findarticles.com/cf\\_0/m0WXI/2368/53412434/pl/article.html](http://www.findarticles.com/cf_0/m0WXI/2368/53412434/pl/article.html) (15.03.2001).

<sup>26</sup> Appendix X of the TDCA at [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); DTI *TDCA* (1999) 9; European Information Service *EU/SA: Free Trade Pact Clinched At Last* at [www.findarticles.com/cf\\_0/m0WXI/1999\\_Feb\\_3/53711311.jhtml](http://www.findarticles.com/cf_0/m0WXI/1999_Feb_3/53711311.jhtml) (15.03.2001).



between the EU and South Africa. "Port" and "Sherry" as the major stumbling block to the conclusion of the agreement will be analysed more closely. Finally the chapter will conclude with an evaluation of whether South Africa's commitment has to be seen as a "precedent" under TRIPs or not.

In chapter six a summary containing the results of the examination is provided. Moreover the question whether the TDCA can be seen as an example for further trade relations between the EU and other ACP countries will be taken up again.

## **2. Historical development of the post-apartheid cooperation between the RSA and the EU**

### **2.1 The prelude to the South African - European Union negotiations**

After South Africa underwent the political transition to a democracy, it wanted to become part of the international trading community again. The tremendous international political support from other states during the apartheid era for the democratic forces ensured that South Africa could count on international assistance for its post-apartheid transformation.<sup>27</sup>

Already at an extraordinary meeting in October 1993 the European Council determined that South Africa would be discussed as a topic for "Joint Action" under the provisions of the Common Foreign and Security Policy (CFSP) of the European Union. Within this "Joint Action" the EU agreed to provide substantial support for the monitoring of the forthcoming elections in South Africa. Furthermore it requested that internal work should begin to create an appropriate cooperation framework to consolidate the economic and social foundation of South Africa's transition to multiracial democracy. Consequently, a first exploratory visit of the European Commission to South Africa took place in February 1994, in order to establish the first political contact between the EU and South Africa.<sup>28</sup>

#### **2.1.1 Package of immediate measures in April 1994**

As an instant response to the successful election process in South Africa, the EU General Affairs Council meeting in Luxembourg on the 18 – 19 April called for a "package of immediate measures" to support South Africa's transition to democracy

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<sup>27</sup> European Parliament-Barbara Simons *Bericht im Namen des Ausschusses für Außenwirtschaftsbeziehungen* (1987) 11; EU COM *Südafrika und die Europäische Gemeinschaft: Leitlinien für eine Politik zur Unterstützung des Übergangs zur Demokratie; Mitteilung der Kommission an den Rat* (1993) 12.

<sup>28</sup> EU COM *Mitteilung der Kommission an den Rat* (1993) 3-6.



and to contribute to reconstruction and development in South Africa.<sup>29</sup> The EU Council of Ministers recognised the importance of trade and market access as an instrument to facilitate South Africa's reintegration into the global economy. It therefore lifted all sanctions and adopted the "package of immediate measures".<sup>30</sup>

In a very broad and general manner, the package of immediate measures contained immediate interim measures as well as a framework for a comprehensive long-term relationship, in order to establish a legal basis for the development of cooperation.<sup>31</sup>

It stated the intention to extend the Generalized System of Preferences (GSP) to South Africa,<sup>32</sup> provide technical assistance in liberalising South Africa's economy, provide technical support for regional economic cooperation and to promote EU investments in small and medium-sized enterprises in South Africa, through the instruments of the European Community Investment Partners (ECIP) and the Business Cooperation Network (BC - Net).<sup>33</sup> Furthermore, the package entailed the intention to initiate cooperation in areas such as industry, commerce, telecommunication, science and technology, education and training and to introduce a political dialogue between the EU and the new government of South Africa. Regarding aid, intentions were expressed to transform the Special Programme for the Victims of Apartheid<sup>34</sup> into a European Programme for Reconstruction and

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<sup>29</sup> The European Commission presented this "Package of immediate measures" to the Council as early as the 6<sup>th</sup> of April 1994. See EU COM *The Commission proposes measures to be submitted to the new government in South Africa* (1994) 1.

<sup>30</sup> EU COM *Partners in Progress* (1999) 36; Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 4; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).

<sup>31</sup> EU COM *Partners in Progress* (1999) 36; EU COM *The Commission proposes measures* (1994) 2-3; Holland "South Africa, SADC and the European Union: matching bilateral with regional policies" *Journal of Modern African Studies* (1995) 272; Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 4; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).

<sup>32</sup> Goodison "Marginalisation or Integration? Implications for South Africa's Customs Union partners of the South Africa-European Union trade deal" *IGD Occasional Paper No 22* (1999) 12. The GSP status for industrial products came into force in September 1994. It provides tariff reductions for a range of South African industrial products, with the exception of coal and steel. Some 2000 non-sensitive industrial and semi-industrial goods were given duty-free access. This nevertheless amounted to only 4.7% of South Africa's exports to the EU.

<sup>33</sup> ECIP is a financial instrument made available by the European Commission, to support the establishment of joint ventures, privatization and private infrastructure projects in developing economies. BC-Net is a financial instrument to provide technical assistance in liberalising developing economies and to provide technical support for regional economic cooperation.

<sup>34</sup> The Special Programme was launched in 1986 and supported anti-apartheid movements in South Africa.



Development (EPRD) allocating considerable amounts of money in support of the Reconstruction and Development Programme. This meant a shift from decentralised Non-Governmental Organisations-based cooperation programmes towards a state-to-state type of cooperation.<sup>35</sup>

These measures became the basis on which discussions with the new Government of National Unity were centred. It is important to note that these were proposals for consideration by South Africa, not a prescriptive ultimatum. The most important of the EU's immediate interim measures was a commitment to remove those international and European sanctions still in place.<sup>36</sup> This was achieved within a month. The actual initial package of measures was presented without prejudice as to the form of the future, more global arrangement, but were also considered to be consistent with, and a legal basis for, the foundations of a longer-term agreement. Consequently, it suggested a simplified structure that contained three broad clauses concerning human rights, a comprehensive cooperation agreement and provisions for specific bilateral policies. However, the enlarged scope of the elements contained within the joint action demanded that the main features of these initial measures be expansive.<sup>37</sup>

On 10 May 1994, Nelson Mandela was inaugurated as the new president of South Africa and the first official visit of a European delegation took place in June 1994.<sup>38</sup>

The Berlin Conference on regional cooperation between the EU and the Southern African Development Community (SADC), dating from the fifth to the sixth of September 1994, provided an opportunity to establish future EU-SA relations in a wider Southern African context. The Conference agreed that the important areas to be investigated were political dialogue, private investment, regional cooperation and trade and development cooperation.<sup>39</sup> In the area of trade cooperation the European

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<sup>35</sup> EU COM *Vorschlag für eine Verordnung des Rates über die Entwicklungszusammenarbeit mit Südafrika* (1995) 1.

<sup>36</sup> EU COM *Mitteilung der Kommission an den Rat* (1993) 3.

<sup>37</sup> Holland "SA, SADC and the EU" *Journal of Modern African Studies* (1995) 272.

<sup>38</sup> EU COM *Partners in Progress* (1999) 36; Holland "SA, SADC and the EU" *Journal of Modern African Studies* (1995) 272.

<sup>39</sup> Kibble, Goodison, Tsie *The uneasy triangle - South Africa, Southern Africa and Europe in the post-apartheid era* (1995) 54; Graumans "Redefining relations between SA and the EU, An Analysis Of The South Africa-European Union Trade And Cooperation Negotiations: 1994-1997" *FGD Occasional Paper No 10* (1997) 11.



Commission indicated that a “window on Lomé” was being considered.<sup>40</sup> While no details were given, this option could be understood as entailing offering South Africa Lomé status but limiting the application of certain provisions.

### 2.1.2 Interim Cooperation Agreement in October 1994

After a second exploratory visit by the European Commission in July 1994, a first simplified Interim Cooperation Agreement between the European Union and South Africa was signed in October 1994 by Sir Leon Brittan, on behalf of the Commission, and by Thabo Mbeki, the First Deputy President of South Africa. The EU Council approved it in December 1994.<sup>41</sup>

It is an elementary text, which basically contains a mutual undertaking to cooperate in all the areas of respective competence.<sup>42</sup> The agreement was limited to just nine general clauses and valid for an indefinite period. Article 1 stressed that “an essential element of the agreement shall be based on respect all areas within their respective of human rights and democratic principles”. According to article 2 of the agreement, the general purpose was to strengthen “relations with a view to promoting harmonious, balanced and lasting social and economic development and cooperation in spheres of competence, including trade”. Article 4 provided the necessary framework for European Investment Bank (EIB) operations in South Africa. A Council Decision granting a Community guarantee to the Bank against losses under loans for projects in South Africa was taken in March 1995, and has been renewed since then.<sup>43</sup> The interim nature of the agreement is underlined in Article 3, which states that it does not “in any way prejudice discussions or negotiations between them regarding other possible contractual arrangements”. Further, Article 6 highlights

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<sup>40</sup> Graumans “Redefining relations between SA and the EU” *FGD Occasional Paper No 10* (1997) 11; Davies *Forging a new relationship with the EU* in: Bertelsmann-Scott, Mills and Sidiropoulos (ed) *The EU-SA Agreement, South Africa, Southern Africa and the European Union* (2000) 6; Goodison “Marginalisation or Integration?” *IGD Occasional Paper No 22* (1999) 13.

<sup>41</sup> Wirtschafts- und Sozialausschuss (WSA) *Stellungnahme des Wirtschafts – und Sozialausschusses zum Thema “Die Beziehungen der Europäischen Union zu der Republik Südafrika”* (20.12.1995) 4; Holland „SA, SADC and the EU” *Journal of Modern African Studies* (1995) 272;

<sup>42</sup> EU COM *Partners in Progress* (1999) 36.

<sup>43</sup> WSA *Stellungnahme des WSA* (1995) 5; EU COM *Partners in Progress* (1999) 37.



regional considerations, and reflects the guidelines agreed to in the EU-SADC Declaration adopted by the Berlin Conference in September 1994.<sup>44</sup>

A third exploratory visit to South Africa was undertaken by the Commission in October 1994. It invited the South African government to engage in negotiations towards a comprehensive and long-term relationship, which the South African government accepted.<sup>45</sup>

### 2.1.3 Conclusion

The first phase marked by official exchanges between the EU and the new government of South Africa has been labelled by some as disappointing. The interim Cooperation Agreement, for example, is criticized for being excessively limited and failing to resolve the question of the membership of the Lomé Convention.<sup>46</sup>

With regard to the Lomé Convention, the text of the 1994 Agreement specifically avoided prejudicing the content of a longer-term relationship or its legal basis.<sup>47</sup> The Agreement was designed purely to provide a legal basis for the development of future cooperation and not to serve as an immediate and comprehensive panacea. It avoided a policy vacuum prior to the negotiation of a long-term arrangement and served an important political function as it symbolised the EU's continuing interest in post-apartheid South Africa.<sup>48</sup> On closer reading, criticism of its scope is unfounded. As noted above, Article 2 proposed the promotion of cooperation in all areas including trade.

The prelude to the negotiations on a long-term trade and cooperation framework, however, showed the EU's interests diverging from South Africa's. Both parties had started work on researching the framework and content of a long-term cooperation and trade relationship and were preparing the ground for future talks. The different

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<sup>44</sup> EU COM *Partners in Progress* (1999) 36; Holland "SA, SADC and the EU" *Journal of Modern African Studies* (1995) 275.

<sup>45</sup> Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 13.

<sup>46</sup> Kibble et al. *The uneasy triangle* (1995) 55.

<sup>47</sup> Holland "SA, SADC and the EU" *Journal of Modern African Studies* (1995) 276.

<sup>48</sup> Holland "SA, SADC and the EU" *Journal of Modern African Studies* (1995) 275.



views on these parameters became clear when South Africa applied for Lomé membership at the end of 1994.<sup>49</sup>

## 2.2 South Africa and the Lomé Convention

### 2.2.1 The South African request for a Lomé-minus membership

After conclusion of the Interim Cooperation Agreement, South Africa formally accepted the EU invitation to work towards a comprehensive and long-term relationship in October 1994. Deputy President Thabo Mbeki formally requested the opening of "negotiations with a view to establishing the closest possible relationship with the Lomé Convention" from the EU Presidency in November 1994. He furthermore required that these should also "cover a possible agreement with the European Union on specific elements that might more appropriately be accommodated outside the Lomé Convention, to the benefit of the existing Lomé members and South Africa itself."<sup>50</sup> South Africa acknowledged that a Lomé-minus arrangement would be most suitable, because of South Africa's level of development and economic structure. Lomé-minus, in South Africa's perspective, would mean an alignment with the Convention in a manner which would be acceptable to current African, Caribbean, Pacific (ACP) members and in the mutual interest of all partners.<sup>51</sup> In practice, South Africa would not seek access to the Special Protocols and would not draw from the European Development Fund (EDF).<sup>52</sup> A second track

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<sup>49</sup> Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) (1997) 13.

<sup>50</sup> EU COM *Partners in Progress* (1999) 38; EU COM *Commission recommendation for a Council decision* (1995) 4; Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 4; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).

<sup>51</sup> Department of Trade and Industry (DTI) *Interdepartmental discussion paper – Appendix III: Basis for negotiations for a Trade and Development Agreement between the Republic of South Africa and the European Union* (1996) 161.

<sup>52</sup> The EDF is a fund, which is funded directly from the budget of the European Union Investment Bank (EIB) The EIB is owned and financed by the Member States of the EU and not by the EU budget. According to Art. 267 ECT the EIB uses parts of its fund for the financial assistance of less developed countries.



would be created to deal with these issues in bilateral agreements.<sup>53</sup> Nonetheless, South Africa wanted to benefit from the trade provisions of the Convention.

The SACU, the SADC, the ACP countries and the European Parliament overwhelmingly supported the Lomé bid.<sup>54</sup> ACP support resulted from the recognition that South Africa's accession could strengthen the ACP's bargaining position with the EU for a post-Lomé trade and cooperation framework. It further reflected the fact that the ACP saw little or no direct trade competition emerging from improved South African access to the EU market.<sup>55</sup>

To evaluate South Africa's request to enter the Lomé Convention, the historical background and the main features of the Convention will be examined first.

### **2.2.2 Background to the Lomé Convention**

The Lomé Convention provides the framework for trade and development cooperation between the EU and, by now, 71 ACP countries. This relationship grew out of a set of links which were in existence when the European Community was established. Most of the ACP countries are in Africa and most of them are former colonies of members of the EU.<sup>56</sup> Thus the EU Member States had special responsibilities towards them.

The Lomé treaties had their historical roots in the concept of association provided for in Part IV of the Treaty of Rome.<sup>57</sup> The EEC Treaty stated that these countries and territories were associated with the EEC, and it had the aim of promoting their economic and social development and of establishing a close economic relationship between them and the EEC. After most of the overseas countries and territories referred to in these articles became independent, their relations with the European Community had to be restructured on the basis of multilateral treaties.

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<sup>53</sup> Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 15-16.

<sup>54</sup> DTI *Basis for negotiations* (1996) 161; Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 16-17; Keet "The European Union's proposed free trade agreement with South Africa: The implications and some counter-proposals" *Development Southern Africa* (1996) 558.

<sup>55</sup> Kibble et al. *The uneasy triangle* (1995) 53.

<sup>56</sup> Links *The EU and Southern Africa: Between Lomé and a Free Trade Agreement* (1998) 59.

<sup>57</sup> Titled "The association of overseas countries and territories"; see Articles 182-188 ECT.



Consequently, the EEC and 18 African states, former colonies of France, Italy and Belgium, in 1963 concluded the first Yaounde Convention, which was replaced by Yaounde II, signed in 1969. These Conventions were supplemented by the two Arusha agreements of 1968 and 1969. Although these were preferential trade and aid agreements, they still bore the marks of the paternalistic approach that most European countries maintained towards their former colonies.

These treaties were replaced by the first Lomé Convention, signed in February 1975. It was a comprehensive trade-and-aid agreement between the Member States of the European Community and a group of 46 ACP countries. The accord stated its objective as being to promote and expedite the economic, cultural and social development of the ACP states and to consolidate and diversify their relations with the European Community, in a spirit of solidarity and mutual interest. The fundamental principles underlying the Convention included equality between partners, respect for each other's sovereignty, mutual interest and interdependence.<sup>58</sup>

Apart from receiving development aid from the EU,<sup>59</sup> the member states also enjoyed preferential access to European markets.<sup>60</sup> The Convention made special provision for the ACP countries in two areas, namely trade and financial cooperation. Under trade it offered unrestricted, non-reciprocal, and duty-free access with regard to industrial products (including coal, steel, textiles, clothing), duty reductions and quantitative access for agricultural products.<sup>61</sup> The Convention differentiated between two types of agricultural products, namely tropical products that do not compete with European farmers and products that are exempted from restrictions applied by the

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<sup>58</sup> Links *The EU and Southern Africa* (1998) 59.

<sup>59</sup> Links *The EU and Southern Africa* (1998) 60: With regard to aid, two main instruments are used to assist the ACP countries. These are the European Development Fund, which provides grants and risk capital, and the European Investment Bank, which provides loans for national and regional development programmes. The EU, for example, had earmarked funds totalling more than 80 billion Rand for development aid programmes to the ACP countries for the period 1995-2000. These comprised EU-funded initiatives such as Stabex, which compensates countries heavily dependent on one or more staple products for severe fluctuations in their export earnings, or Sysmin, which provides finance for the upkeep or reconstruction of mining installations during periods when their operation is curtailed by unforeseen circumstances.

<sup>60</sup> Bertelsmann-Scott "The European Union, South Africa and the Free Trade Agreement" *South African Yearbook of International Affairs* (2000) 117-118.

<sup>61</sup> Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 4-5; Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 118.



Common Agriculture Policy of the EU.<sup>62</sup> An additional four protocols for sugar, beef and veal, rum and bananas were attached to the Lomé Convention.<sup>63</sup> These protocols gave free access to EU markets for a fixed quantity of exports from selected and traditional suppliers.<sup>64</sup> Under financial cooperation, the Convention provided for massive aid packages.<sup>65</sup>

Concerning its time frame, the Convention was reviewed at regular intervals. The last Convention, Lomé IV, covered the period 1990 until 2000 and numbered 71 ACP countries. Lomé IV bis expired in February 2000 and was replaced by the Cotonou Agreement.<sup>66</sup>

### **2.2.3 Reasons for South Africa's request for Lomé-minus membership**

The fact that the Lomé Convention, at the time, was scheduled to expire in 2000 raised the question as to why South Africa sought access to Lomé IV bis .

#### **2.2.3.1 Implementation within a relatively short term**

That access to Lomé IV bis would be an option which could be implemented within a relatively short term, compared to the lengthy process of negotiating an agreement especially tailored for South Africa's needs, has been regarded as a major reason for this request. It would give South Africa time to research and analyse the future course of its trade relations with the EU and Southern Africa in greater detail.<sup>67</sup>

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<sup>62</sup> Bertelsmann-Scott "The EU, SA and the FTA" SAYII (2000) 118; see Chapter 3.1.2.3 for further explanation of the Common Agricultural Policy.

<sup>63</sup> EU COM "La Convention de Lomé IV, telle que révisée par l'accord signé à Maurice le 4 novembre 1995" *Le Courier No 155* (1996) 168-170.

<sup>64</sup> Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 5.

<sup>65</sup> Bertelsmann-Scott "The EU, SA and the FTA" SAYII (2000) 118.

<sup>66</sup> Maasdorp "Study on the impact of introducing reciprocity into trade relations between the EU and the SADC region" *IGD Occasional Paper No 21* (1999) 16; for a detailed explanation of the expiry of the Lomé Convention and for a description of its successor, the Cotonou Agreement, see Chapter 2.12.

<sup>67</sup> Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 14.



### 2.2.3.2 Non-reciprocity and best preferential market access

Furthermore, Lomé membership would also provide preferential access to EU markets, ahead of other more competitive international exporters, without opening the South African market to European products, due to the non-reciprocity of the Lomé agreement. This would protect the South African industrial sector, most of it vulnerable and uncompetitive at the time, from competition with the EU. Thus membership of the Lomé Convention was regarded as the most advantageous of all possible trade links with the EU, offering the best preferential market access, such as duty- and quota-free access for all industrial goods.<sup>68</sup>

### 2.2.3.3 Facilitation of regional integration

Since South Africa's neighbours were members of the Lomé Convention, it was further argued that accession to the Lomé Convention would bring South Africa's trade access to the EU market in harmony with that of the SADC.<sup>69</sup> With South Africa's relatively well-developed industrial base and access to the EU's extensive markets under Lomé, joint manufacturing ventures in Southern Africa were expected to provide the basis for qualitatively more advanced economic diversification and development across the whole region. This, in turn, would help to consolidate an effective new economic grouping in Africa.<sup>70</sup> Finally, as far as South Africa was concerned, the acceptance of these factors would have facilitated a shorter negotiating process.<sup>71</sup>

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<sup>68</sup> Keet The "EU's proposed FTA" *Development Southern Africa* (1996) 556.

<sup>69</sup> DTI *Basis for negotiations for a TDA* (1996) 161; Holland "SA, SADC and the EU" *Journal of Modern African Studies* (1995) 277.

<sup>70</sup> DTI *Basis for negotiations for a TDA* (1996) 161; Keet "The EU's proposed FTA" *Development Southern Africa* (1996) 556.

<sup>71</sup> DTI *Basis for negotiations for a TDA* (1996) 161.



## 2.2.4 EU's rejection of South Africa's request

The European Union rejected South Africa's request for access to the Lomé Convention and advanced the following arguments to support its position:<sup>72</sup>

### 2.2.4.1 South Africa's status as a developed country

The EU's position was based on the fact that South Africa was officially classified by the WTO as a developed, lower middle income country and that its inclusion in the Lomé Convention would have violated Article 363 (1) of the Convention, which requires that any acceding state's economy is "comparable to those of the ACP countries."<sup>73</sup>

The EU doubted this comparability. From its point of view the exclusion of South Africa was based on the regulation that the Lomé system of non-reciprocal trade preferences was specifically designed to assist the development of some of the world's poorest countries and on the dual nature of the South African economy.<sup>74</sup> In certain respects, South Africa more closely resembles a "developed" than a "developing" country. With a per capita gross national product (GNP) of US\$ 3040 in 1994, South Africa already ranked amongst upper middle income countries like

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<sup>72</sup> Keet "The EU's proposed FTA" *Development Southern Africa* (1996) 556 – 557; Rojahn & Roehm "Das Freihandelsabkommen EU-Südafrika: Testfall für eine neue Lomé Politik der EU" *Ifo-Schnelldienst* (1999) 18; Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 18; Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 4; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).

<sup>73</sup> Eisenberg "South Africa, Countertrade and The General Agreement on Tariffs and Trade" *Stellenbosch Law Review*, Vol. 4 No 2 (1993) 143-144; Solignac Lecomte *The impact of the EU-SA Agreement on Lomé* in: Bertelsmann-Scott, Mills, Sidiropoulos (ed) *The EU-SA Agreement: South Africa, Southern Africa and the European Union* (2000) 56; Holland "SA, SADC and the EU" *Journal of Modern African Studies* (1995) 278; Keet "The EU's proposed FTA" *Development Southern Africa* (1996) 557; Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 18; Stevens & Page *Trading with South Africa: the policy options for the EC* (1992) Viii - IX; Stevens & Kennan *Trade between South Africa and Europe* (1995) 26; Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 10; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001); However, classification in the WTO is by self-selection, and thus it is for South Africa to choose what category of country it falls under. The current classification dates back to 1945.

<sup>74</sup> EU COM "South Africa: Lomé IV 86<sup>th</sup>'s member" *The Courier No 164* (1997) 3; Lowe "Combat poverty and help our ACP partners to expand trade, investment and employment: these are the 21<sup>st</sup> century challenges" *The Courier No 169* (1997) 3; EU COM *Partners in Progress* (1999) 25.



Malaysia, Brazil and the Czech Republic.<sup>75</sup> Furthermore its gross domestic product (GDP), with 120 billion US\$, was larger than of Ireland, Portugal, Greece and Finland, all of them Member States of the EU.<sup>76</sup>

However, taking into consideration the specific situation of South Africa, I think that this categorization seems questionable.

The United Nations Development Programme's (UNDP) Human Development Report for 1995 showed that, while South Africa as a whole was rated 70<sup>th</sup> in the world according to its human development indicators, "white" South Africa on its own would rank in the top 40 countries, whereas "black" South Africa would be 128<sup>th</sup> of 174 countries. According to this report, certain indicators such as life expectancy, child mortality rates and adult illiteracy showed that the situation for the majority of the black population was as bad as those in many least developed countries.<sup>77</sup> The gap between rich and poor has basically remained unaltered since this 1995 report. A report of the World Bank shows that, while South Africa's per capita income places it among the middle income countries, its income disparities are among the most extreme in the world. Thirteen percent of the population (about 5.4 million people) live under "first world" conditions. At the other extreme, 53 % of the population (about 22 million people) live under "third world" conditions. In this group, only one quarter of households have access to electricity and running water, only half have primary school education, and more than a third of the children suffer from chronic malnutrition.<sup>78</sup>

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<sup>75</sup> EU COM "South Africa" *The Courier* No 164 (1997) 3.

<sup>76</sup> Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (1997) 268.

<sup>77</sup> United Nations *Human Development Report 1995* at [www.undp.org/hdro/98hdi.htm](http://www.undp.org/hdro/98hdi.htm) (08.05.2001); Keet "The EU's proposed FTA" *Development Southern Africa* (1996) 557.

<sup>78</sup> World Bank *The World Bank Group countries: South Africa* at [www.worldbank.org/afr/zaz.htm](http://www.worldbank.org/afr/zaz.htm) (08.05.2001).



#### 2.2.4.2 Criticism from other WTO Members

Since the EU regarded South Africa as a developed country, it further stated that South Africa's accession to the Lomé Convention would be subject to major criticism from other WTO members.<sup>79</sup>

However, the WTO signatories acknowledged the fact that its classification as a developed lower middle income country in terms of GDP does not represent the general economic situation of the vast majority of black South Africans during the anti-apartheid years.<sup>80</sup> Furthermore, both the United States of America (USA) and Japan have classified South Africa as an "economy in transition",<sup>81</sup> similar to eastern European countries, which would mean the enjoyment of advantages similar to those accorded to developing countries, but on a more temporary basis. The USA even expressed having no objection to accession of South Africa to the Lomé Convention.<sup>82</sup>

#### 2.2.4.3 Negative impact on the ACP countries

An initial response in Europe to South Africa's interest in joining Lomé was that its membership would be contrary to Article 363 (4) of the Lomé Convention, which stipulates that accession of a new member state should not adversely affect the advantages accruing to the ACP states. The EU argued that the other ACP countries would feel threatened by South Africa's higher level of economic development, which could lead to a replacement of their existing exports to the EU.<sup>83</sup>

Indeed the volume of South African exports to the EU would have been equivalent to 50% of all the ACP exports to the EU. According to the EU, this would have adversely affected the existing exports of ACP countries to the EU. However,

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<sup>79</sup> Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 18; Solignac Lecomte *The impact on Lomé* (2000) 56; Holland "SA, SADC and the EU" *Journal of Modern African Studies* (1995) 278; Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 14.

<sup>80</sup> Keet "The EU's proposed FTA" *Development Southern Africa* (1996) 557.

<sup>81</sup> Bertelsmann-Scott, Mills & Gibb *The EU – SA Agreement in a global context* in: Bertelsmann-Scott, Mills, Sidiropoulos (ed) *The EU-SA Agreement, South Africa and the European Union* (2000) 25; Stevens & Kennan *Trade between South Africa and Europe* (1995) 8. They argue that SA even has many trading characteristics of a much poorer developing country.

<sup>82</sup> Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 15.

<sup>83</sup> Keet "The EU's proposed FTA" *Development Southern Africa* (1996) 556; Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 18.



although half of the ACP exports to the EU would have been equivalent, the South African products - mostly minerals and a few agricultural products - were of a very different profile. The mineral exports of the ACP countries entered the EU duty-free and the agricultural exports constituted only a small percentage of South Africa's exports to the EU.<sup>84</sup> Therefore Keet and Graumans argued that the fear of an increase in trade competition among the ACP countries was disproportionate with regard to the volume of the equivalent exports suggested.<sup>85</sup>

Furthermore, Jenkins and Naudé stated that South Africa's economic and political weight could strengthen the ACP countries in their negotiations with the EU on the future of the Lomé convention. With the SADC countries stressing that South Africa's entry into Lomé was important for the consolidation of the Southern African region, the ACP countries supported South Africa's admission.<sup>86</sup>

#### **2.2.4.4 Fear of competition**

Moreover, the EU put forward that the export of South African agricultural products could pose a threat to the European agricultural sector, because many of South Africa's agricultural exports are the same as those produced in certain European countries. Southern European countries, especially, were concerned about the import of citrus fruits.<sup>87</sup>

However, in my opinion, any menace that South African agricultural products present to the European agricultural sector seems to be much exaggerated. South Africa has an insignificant market share in the EU, with her total agricultural exports to the EU comprising less than 2% of the EU's total agricultural imports.<sup>88</sup> In 1995, Greece was the country most likely to be affected, since it competed on six items which, together, accounted for 3.25% of the country's exports to other EU member states. Spain and Portugal came next, followed by Belgium, the Netherlands and Luxemburg. These two groups experienced competition in products which respectively accounted for just

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<sup>84</sup> Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 15.

<sup>85</sup> Keet "The EU's proposed FTA" *Development Southern Africa* (1996) 557.

<sup>86</sup> Keet "The EU's proposed FTA" *Development Southern Africa* (1996) 557-558.

<sup>87</sup> Jenkins / Naudé "Reciprocity in trade relations between South Africa and Europe" *Development Southern Africa* (1996) 18.

<sup>88</sup> DTI *Basis for negotiations for a TDA* (1996) 166.



over and just under 1% of their total exports to other member states. None of the other countries appeared to have any significant area of overlap: where they had exports of the same products as those of interest to South Africa, the values involved were so small as to be less than 0.5% of their total intra-EU exports.<sup>89</sup> Concerning citrus fruit, the fear of European farmers was also exaggerated. These mainly grow in one small part of South Africa, the Western Cape, and they enter the European market during the European off-season and do not directly compete with European producers. From my point of view South African agricultural exports thus present no direct threat to EU producers.<sup>90</sup>

### **2.2.5 Evaluation of South Africa's request to enter the Lomé Convention and of the EU's rejection thereof**

Regarding the arguments put forward by the EU, the real reason for the EU position seems to be the fear of increasing competition from South African exports for the European economy. Although South African exports did not constitute a threat to the European market at the time,<sup>91</sup> it is important to note that South Africa's potential exports would be competing with those of Eastern European countries, which, according to the Agenda 2000,<sup>92</sup> are potential future members of the European Union. Viewed in this light and taking South Africa's status as a "developed" country into consideration, South Africa had a strong case in that - despite the European Union's argument - its admission to Lomé would not have been incompatible with the WTO's provisions for less developed countries.

The question whether South Africa's request for Lomé membership was advantageous for South Africa or not, has been judged differently.

For some, Lomé membership was a very important option for South Africa, because of the market access it could have provided for the country's agricultural produce, the

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<sup>89</sup> Stevens & Kennan *Trade between South Africa and Europe* (1995) 16.

<sup>90</sup> DTI *Basis for negotiations for a TDA* (1996) 166.

<sup>91</sup> Stevens & Kennan *Trade between South Africa and Europe* (1995) 4-13.

<sup>92</sup> Agenda 2000 gives an overview of the policy of the EU after the year 2000 and deals with the enlargement of the EU.



regional cumulation provisions for manufactured goods and project tendering and other rights. For South Africa's relatively weak industries, Lomé membership would have provided access to EU markets ahead of other more competitive international exporters. With South Africa's relatively developed industrial base and access to the EU's vast market under Lomé, joint manufacturing ventures in Southern Africa could have provided the basis for qualitatively more advanced economic diversification and development across the whole region. This would have helped consolidate an effective new economic grouping in Africa.<sup>93</sup>

Others harshly criticised South Africa's request to become a member of the Lomé Convention as a mistake. From their point of view, by asking to join the other ACP countries, South Africa put itself on the same level with some of the world's poorest countries. South Africa gave signals to the world that it did not see itself as a growing and forceful economy, but rather as a developing country in need of development aid from the EU. It thereby cast great doubt on it being a stable and promising location for investments.<sup>94</sup>

In my view, both arguments have some truth in them. Though full membership was a great temptation for South Africa, even partial membership had some undoubted advantages. The economic areas where South Africa could benefit from membership of the Convention included, inter alia, eligibility for tenders for projects in all ACP countries (amounting to Euro 7,5 billion) financed from the 8<sup>th</sup> European Development Fund (EDF) and full participation in the institutions of the Convention.<sup>95</sup> At a political level, South Africa received important opportunities for cooperation and integration with the ACP states through the Lomé membership. This would assist South Africa in redressing its historically isolated position, both at an international level and vis-à-vis its neighbours in the SADC region.<sup>96</sup> Moreover, South Africa had

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<sup>93</sup> Keet "The EU's proposed FTA" *Development Southern Africa* (1996) 556.

<sup>94</sup> Bertelsmann-Scott "The EU, SA and the FTA" SAYII (2000) 268; Jenkins / Naudé "Reciprocity in trade relations" *Development Bank Southern Africa* (1996) 17-30.

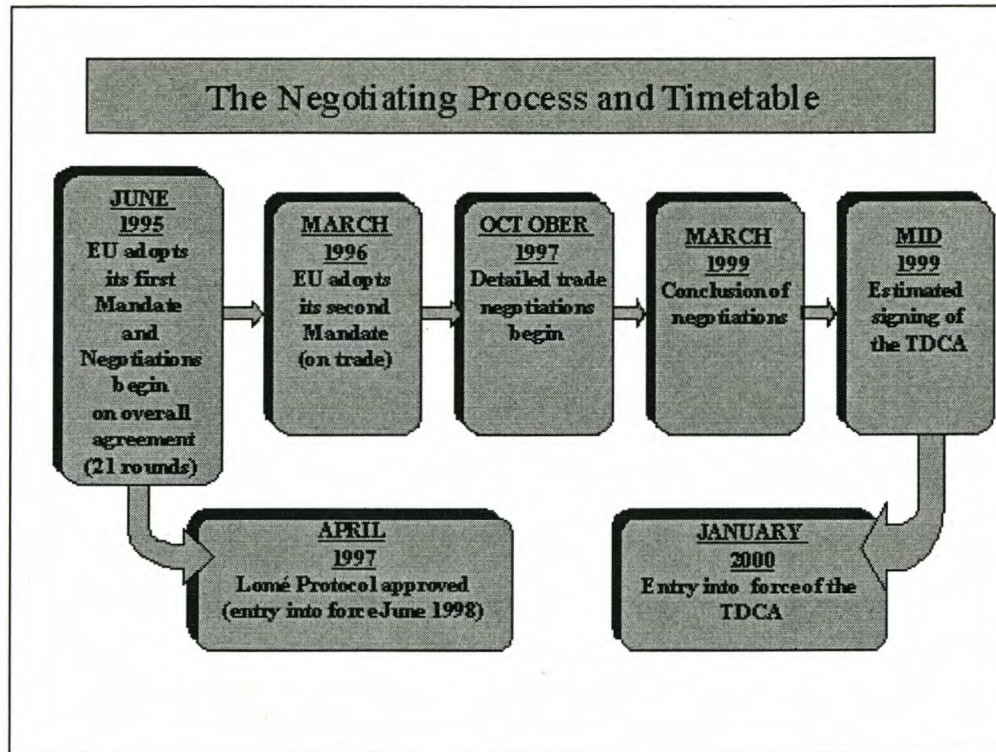
<sup>95</sup> EU COM *Partners in Progress* (1999) 25; EU COM "South Africa" *The Courier No 164* (1997) 2; One has to bear in mind that, according to Article 267 ECT, the EDF should be used for the financial assistance of less developed countries. Thus, South Africa's participation in the EDF has to be seen as a preferential treatment. See for further explanation of the EDF Chapter 2.2.1.

<sup>96</sup> EU COM *Partners in Progress* (1999) 25.



the possibility of influencing the political dialogue between the EU and the ACP countries with regard to the successor of Lomé IV bis, the Cotonou agreement.<sup>97</sup>

## 2.3 Start of negotiations for a long-term framework of cooperation



### 2.3.1 Declaration of Intent of May 1995

As the political situation in South Africa evolved, the European Commission adapted the emphasis and modalities of its operation. A Delegation of The European Commission opened in 1994, and in 1995 the Special Programme was renamed "The European Programme for Reconstruction and Development in South Africa (EPRD), echoing the new South Africa's own Reconstruction and Development Programme (RDP).<sup>98</sup> Following the signing of a Declaration of Intent between the Commission,

<sup>97</sup> Morrissey Post Lomé - new partnership agreed (2000) 5.

<sup>98</sup> EU COM *History of EU-SA Cooperation* at [www.eusa.org.za/History of EU SA Cooperation.htm](http://www.eusa.org.za/History%20of%20EU%20SA%20Cooperation.htm) (14.08.2000).



represented by Commissioner Pinheiro, and the South African Government, represented by Minister Jay Naidoo, in May 1995, the EPRD focused on the following sectors: Education and Training, Health, Rural and Urban Development, Good Governance and Private Sector Development. Support for the Private Sector Development was targeted at enterprises and addressed the gender issue by giving particular attention to the needs of women. Attention was also given to banks by encouraging them to offer services to the disadvantaged population.<sup>99</sup>

### 2.3.2 The EU two-track proposal in June 1995 and the official opening of the negotiations

In reply to Mbeki's request of November 1994, the EU Council of Ministers approved detailed directives for the European Commission to negotiate a long-term framework for the relationship between the EU and the RSA on 19 June 1995. These directives entailed the so-called two-track approach, consisting of:

- A protocol to the Lomé Convention covering terms and conditions of South Africa's accession to the Convention; and
- A bilateral Trade and Cooperation Agreement between the European Community and South Africa.<sup>100</sup>

On 30 June 1995 the negotiations between the Community and South Africa were officially opened. Commissioner Pinheiro, on behalf of the Community, presented the details of the EU proposals to his South Africa counterpart, Minister of Trade and Industry Trevor Manuel, and expressed the Community's desire for the two-track approach.<sup>101</sup> Regarding the bilateral agreement on trade, the EU envisaged

<sup>99</sup> EU COM *Partners in Progress* (1999) 15.

<sup>100</sup> EU COM *Empfehlung für einen gemeinsamen Standpunkt des Rates zur Genehmigung des Protokolls über den Beitritt der Republik Südafrika zum vierten AKP – EWG Abkommen in der Fassung des am 4. November in Mauritius unterzeichneten Abkommens* (1997) 2; WSA *Stellungnahme des WSA* (1996) 5; DTI *Basis for negotiations for a TDA* (1996) 161; Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 16; Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 5; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).

<sup>101</sup> DTI *Basis for negotiations for a TDA* (1996) 182; EU COM *Partners in Progress* (1999) 38; WSA *Stellungnahme des WSA* (1996) 5; Graumans "Redefining relations between SA and the EU" *FGD*



progressive and reciprocal liberalisation of trade. It therefore invited South Africa to engage in negotiations leading to a free trade agreement (FTA).<sup>102</sup> While the Commissioner stressed that the FTA option was only a proposal put forward for South Africa's consideration, the European Commission mandate maintained that it would be the only option for South Africa to obtain increased market access to the EU during the first phase of its transition.<sup>103</sup> According to the EU, an FTA should:

- Comply with WTO rules;
- Consider sensitive interests and products within the EU; and
- Cover the rights of establishment, provisions on services and the free movement of capital and free settlement of current transactions in convertible currencies.<sup>104</sup>

Separate agreements would need to be negotiated on fisheries, wine and spirits and science and technology. This, however, had to happen in a comprehensive way, which meant that negotiations on these agreements should be in parallel and concluded in principle at the same time as the trade and cooperation agreement and the protocol on accession to the Lomé Convention.<sup>105</sup>

The discussions and meetings following 30 June centred around reaching an agreement on a framework for negotiations.

### 2.3.3 Technical discussions

Rounds of technical discussions were held in July and September 1995. The principal objective of the European Commission in these discussions with South Africa was to secure South Africa's agreement in principle to the concept of the FTA.

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*Occasional Paper No 10* (1997) 18; Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 21.

<sup>102</sup> Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 18; Keet "The EU's proposed FTA" *Development Southern Africa* (1996) 558; WSA *Stellungnahme des WSA* (1996) 5-6.

<sup>103</sup> DTI *Basis for negotiations for a TDA* (1996) 182.

<sup>104</sup> WSA *Stellungnahme des WSA* (1996) 6-7; EU COM *Commission Staff working paper: Towards a free trade area between the European Union and South Africa* (1996) 3.

<sup>105</sup> EU COM *Partners in Progress* (1999) 7; Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 18.



While the South African negotiators were mindful that the EU proposals would not call for complete free trade, they were unclear what the precise scope of the proposed FTA would be. For this reason they sought detailed information with regard to specific products on which South Africa would be allowed duty-free access to the EU market and for which specific products the EU would be seeking duty-free access to the South African market.<sup>106</sup>

The Commission negotiators, however, avoided discussing any of the tricky detailed issues which South African representatives repeatedly raised. They shifted the focus to discussion of general principles, with the aim of securing a firm and irrevocable commitment "in principle" from the South African government to the conclusion of an FTA with the EU and eventually the South African government agreed to accept the establishment of a FTA as a long-term objective for EU-South Africa trade relations. This South African commitment, however, was qualified by the insistence "that nothing is agreed until everything is agreed".<sup>107</sup> Moreover South Africa expressed the need to obtain a detailed proposal from the EU in terms of the coverage, products, transition, and asymmetry of an FTA.

Concerning the agricultural sector, which the EU traditionally excluded from any agreement, the South African government expressed considerable concern over the impact of EU subsidies in the agricultural sector and wanted the impact of EU subsidies included in any discussion on future trade relations in this sector.<sup>108</sup> Many detailed points were raised in this regard in an effort to draw the relevant EU departments into a meaningful process of dialogue on this issue. The EU's Directorate General for Trade, however, showed a marked reluctance to be drawn on these issues,<sup>109</sup> which made it clear to the parties that progress in future negotiations of the agricultural sector would be difficult.

With regard to the economic restructuring in South Africa and the different levels of development between South Africa and the EU, South Africa highlighted the need for

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<sup>106</sup> Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 19.

<sup>107</sup> EU COM *Partners in Progress* (1997) 38; WSA *Stellungnahme des WSA* (1996) 8.

<sup>108</sup> DTI *Basis for negotiations for a TDA* (1996) 165; Goodison *The EU's trade and Development Policy: South Africa and the SADC* in: Foundation for Global Dialogue (ed) *Trading on development: Proceedings of a workshop on South Africa's trade and development relations with the European Union* (1997) 50.

<sup>109</sup> Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 22.



a future FTA to have non-reciprocity for at least the first ten years of the agreement. Concerning its relations to the BLNS countries, South Africa underlined that it was in the process of renegotiating the SACU agreement with the BLNS. The intention was to protect and preserve the integrity of the common customs union. The South African authorities further stated that the lack of appreciation in the EU mandate for the integrated nature of South Africa's economy within the SACU and its current efforts to integrate with the rest of Southern Africa in an FTA was alarming. As far as Article 19 (1) of the SACU agreement (1969) was concerned, BLNS had the right to approve or veto any agreement signed by South Africa with the EU following any negotiation with the EU. Therefore their concerns had to be considered in an agreement between South Africa and the EU.<sup>110</sup> The European Commission repeatedly assured the South African negotiators that all these regional and national concerns could be addressed within the process of substantive negotiations, once a more detailed supplementary negotiating mandate had been agreed upon by the EU Council of Ministers.<sup>111</sup>

### 2.3.4 The second EU mandate in March 1996

The need for complementary EU negotiating directives became apparent after these first technical discussions. The EU invited the Member States to put forward lists of sensitive products to be taken into account in the negotiations of the EU-SA FTA and in the following months the EU-SA FTA was to be the subject of extensive discussion among the EU Member States. Since they struggled with finalising the EU mandate the Foreign Minister of the United Kingdom, Malcolm Rifkind, called on the EU Foreign Ministers to make good their promises to South Africa to support its democratic transition. He expressed alarm at the protectionist attitude of some of his colleagues and disputed that the EU would be injured by South African exports.<sup>112</sup> Frustrated by the lack of progress of the EU in finalizing its mandate the South African negotiators froze further discussions on all aspects of the long-term

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<sup>110</sup> DTI *Basis for negotiations for a TDA* (1996) 172-173; WSA *Stellungnahme des WSA* (1996) 8; See Article 19 (1) of the SACU agreement in Appendix 1.

<sup>111</sup> Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 22; WSA *Stellungnahme des WSA* (1996) 9.

<sup>112</sup> DTI *Basis for negotiations for a TDA* (1996) 162.



framework in December 1995 until such time as the Commission had received complementary negotiating directives from the Council.<sup>113</sup>

However, agreement within the EU was not reached on the complementary negotiating directives and it was decided by the General Affairs Council at its 29 January 1996 meeting to postpone a decision.<sup>114</sup> In March 1996, the EU Council of Ministers finally presented complementary negotiating directives to the Commission about what to offer South Africa in the FTA negotiations.<sup>115</sup>

#### 2.3.4.1 The contents of the EU offer

The offer of the EU provided for economic and development cooperation, cooperation in other areas (such as environment, culture, science and technology), as well as the establishment of regular political dialogue and several institutions.<sup>116</sup>

In the trade area the Commission proposed that the FTA between South Africa and the EU had to be in line with the WTO rules. It had to cover at least 90% of all actual and potential trade between the two parties at the end of a ten- or, at most, twelve-year transitional period and not leave out any significant sector.<sup>117</sup> Its aim should be to take into account the uneven development levels of the EU and South Africa.<sup>118</sup>

While containing no details at the level of individual sectors and products, the offer did set out the broad timetable under which tariffs would be eliminated on both non-agricultural and agricultural products.

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<sup>113</sup> EU COM *Commission Staff working paper* (1996) 4; Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 5; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).

<sup>114</sup> Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 20.

<sup>115</sup> DTI *Basis for negotiations for a TDA* (1996) 162; EU COM *Partners in Progress* (1999) 38; Kuschel *Die zukünftigen Handels- und Wirtschaftsbeziehungen zwischen der Europäischen Union und Südafrika* (1996) 269.

<sup>116</sup> EU COM *Bilateral Relations* at [www.europa.eu.int/comm/dg08/s-a/en/bilat.htm](http://www.europa.eu.int/comm/dg08/s-a/en/bilat.htm) (15.03.2001).

<sup>117</sup> Keet "The EU's proposed FTA" *Development Southern Africa* (1996) 558; Kuschel "Die zukünftigen Handels- und Wirtschaftsbeziehungen zwischen der Europäischen Union und Südafrika" *Internationales Afrikaforum* (1996) 269; Mills "Free trade with the European Union?" *SAYIA* (1996) 45.

<sup>118</sup> EU COM *Partners in Progress* (1999) 8.



According to this schedule, the EU had to eliminate duties on 60% of its imports from South Africa in three phases over ten years, for the agricultural sector, starting with 25% in the first year, 5% over the next three years, and 30% in the remaining seven years. South Africa, for its part, had to eliminate duties on 95% of its imports from the EU in two phases over ten years, starting with 50% in the first year and 45% over the rest of the ten years.<sup>119</sup>

For the non-agricultural sector these timetables proposed that the EU should eliminate duties on 97% of its imports from South Africa in two phases over three years, starting with 93% in the first year. South Africa, on the other hand, was bound to eliminate duties on 88% of imports from the EU in three phases over ten years, starting with 53% in the first year, 15% over the next three years and 20% over the rest of the ten years.<sup>120</sup>

Significantly, both timetables called for tariff elimination to begin on certain products from the time of the signing of the agreement, with duties being eliminated on further volumes of trade in each of the succeeding years, until the agreed percentage of duty-free access had been achieved within the specific time period.<sup>121</sup>

The directives further stipulated that liberalisation should comply with the principles of the Common Agriculture Policy (CAP<sup>122</sup>) such as preference for agricultural products from EU member states. An FTA with South Africa should also take into account the EU's agreements with preferential partners and its economic interests.<sup>123</sup>

It was further proposed that a protocol concerning the rules of origin should be annexed to the FTA agreement, and had to be inspired by the ongoing harmonisation process in the EU of its preferential rules of origin applicable to third countries and be consistent with those of the Lomé Convention. In particular the protocol had to include a cumulation procedure, with the objective of promoting a closer economic integration. Moreover, the EU mandate proposed that the FTA cater for the free

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<sup>119</sup> DTI *Basis for negotiations for a TDA* (1996) 165; Goodison *The EU's Trade and Development Policy* (1997) 44-45; Keet "The EU's proposed FTA" *Development Southern Africa* (1996) 558-559.

<sup>120</sup> DTI *Basis for negotiations for a TDA* (1996) 165; Goodison *The EU's Trade and Development Policy* (1997) 44-45; Keet "The EU's proposed FTA" *Development Southern Africa* (1996) 558-559.

<sup>121</sup> Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 23.

<sup>122</sup> See for an explanation of CAP Chapter 3.1.2.3.

<sup>123</sup> Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 20.



movement of capital, allowing all payments for current transactions to be made in a freely convertible currency and ensuring the freedom of repatriation of foreign direct investments and all profits. Only in cases of serious balance of payment problems could these be overruled.<sup>124</sup>

#### 2.3.4.2 Evaluation of the EU offer

The EU's offer on tariff elimination was described from the South African side as being unfairly favourable to Europe.

The EU trade mandate excluded more than 40% of South Africa's trade in agricultural products to the EU, compared to only 5% of EU agricultural products to South Africa.<sup>125</sup> If the negative lists drawn up by the EU had remained unchanged only 5% to 10% of South Africa's current exports to the EU would have benefited from a material improvement in terms of access as a result of the FTA. For non-agricultural products, South Africa would have had to eliminate duties on around 36% of its EU imports, whereas Europe would only have had to liberalise duties on 4% to 7% of its South African imports.<sup>126</sup>

The likely adjustment costs for South Africa were thus said to be far greater than those faced by the EU.<sup>127</sup> In addition to this, the duty-free entry of up to 88% of EU manufactured goods into South Africa would start with 53% in the very first year. Taking into consideration the comparatively weaker competitiveness of South African industries, this was likely to favour European enterprises disproportionately.<sup>128</sup>

These numbers can, however, give a wrong impression.

First of all, the EU's proposal can be classified as a so-called "negative-list" approach. That means that the EU was willing to liberalise on all items not specifically mentioned on a negative list of exceptions. This approach was generally more

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<sup>124</sup> See Chapter 3.1.8 for an explanation of the rules of origin; Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 21.

<sup>125</sup> DTI *Basis for negotiations for a TDA* (1996) 163; Louw "EU trade: SA battles hardening Europe" *Southern Africa Report* (1997) 11; Keet "The EU's proposed FTA" *Development Southern Africa* (1996) 559.

<sup>126</sup> Goodison *The EU's Trade and Development Policy* (1997) 41.

<sup>127</sup> Goodison *The EU's Trade and Development Policy* (1997) 49.

<sup>128</sup> DTI *Basis for negotiations for a TDA* (1996) 165; Keet "The EU's proposed FTA" *Development Southern Africa* (1996) 559.



favourable to South Africa than a positive list, in which it would have had to negotiate the inclusion of every item to be liberalised. Secondly, the EU proposals required South Africa to eliminate tariffs on a far higher volume of trade, since South African tariff levels were on average three times higher than EU tariffs.<sup>129</sup> And, thirdly, it has to be noted that 80% of South Africa's exports to the EU were duty-free already at the time of the negotiations, due to the non-existence of tariffs for primary products. In contrast, the percentage of EU exports entering South Africa duty-free at the same time was only around 44%.<sup>130</sup>

In response to the reproach that it excluded a significant percentage of South Africa's agricultural exports, the EU argued that the list of products left out of the FTA predominantly were highly successful South African export products such as apples, pears, oranges, wines and cut flowers that constituted a threat for European producers. These products nevertheless only constitute 4% of the EU's total imports from South Africa and the tariffs on them only range from 10% to 25%.<sup>131</sup> South African fruit exporters have demonstrated in the past that they are able to sell these goods in large quantities on the European market, despite the existing tariffs. In the view of the EU, the FTA would not prevent these producers from doing so in the future.<sup>132</sup>

Concerning the impact of the EU-SA FTA, it was notable that no reference was made to the SACU in the EU offer. After six months of intense discussion with the EU, what emerged was a supplementary negotiating directive, which reflected the particular concerns of EU Member States with regard to the domestic impact of the proposed FTA agreement, rather than the political commitments made by EU foreign ministers in the context of the EU's Common Foreign and Security Policy with regard to Southern Africa.<sup>133</sup>

Although the EU did not fully appreciate and recognise the integrated nature of South Africa's economy within Southern Africa, the EU mandate, in my opinion, at least

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<sup>129</sup> Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 25.

<sup>130</sup> Goodison *The EU's Trade and Development Policy* (1997) 49; Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 9.

<sup>131</sup> Mills "Free trade with the European Union" *SAYIA* (1996) 46.

<sup>132</sup> EU COM *Speech of Commissioner Pinheiro at the European Conference on Southern Africa in Maastricht: Southern Africa - the challenge to Europe. Building a new framework for trade and cooperation with South Africa and the other countries in the Southern African Region* (1995) at [www.europa.eu.int/comm/dg08/speeches.htm](http://www.europa.eu.int/comm/dg08/speeches.htm) (15.03.2001).

<sup>133</sup> DTI *Basis for negotiations for a TDA* (1996) 168; Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 25.



presented a basis for discussion and debate, and in this way provided a negotiating platform.

## **2.4 South Africa's counterproposal**

### **2.4.1 The development of the proposal**

After receiving the official EU mandate, South Africa initiated a process of domestic and regional consultation to formulate its own mandate for negotiations with the EU. This process involved consultations with the other SACU and SADC member states and intensive research on the impact of the agreement on trade and economic development in South and Southern Africa.<sup>134</sup> The formulation of SA's mandate was influenced to great extent by the signing of the SADC Protocol on Trade, in Maseru, in August 1996. There, the SADC member states decided to move towards a free trade area in the Southern African region. Equally important during this period was the presentation by the EU in November 1996 of the Green Paper on future relations with the ACP countries. Its central message was that the Lomé Convention had become unviable in the context of the changed world system. The move from a bi- to a multi-polar world system and the consequences of this for the EU called for a change in the EU-ACP relationship. The South African negotiating mandate could therefore be finalised only by the end of November 1996.<sup>135</sup>

### **2.4.2 The objectives of an agreement**

The different portfolio committees met with officials of the Department of Trade and Industry and Agriculture in August 1996, with the purpose of formulating a widely endorsed and accepted negotiating mandate.<sup>136</sup> Their main criticism of the European mandate was that it failed to take account of the very different sizes and levels of

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<sup>134</sup> Mills "Free Trade with the EU" SAYIA (1996) 46.

<sup>135</sup> DTI *Basis for negotiations for a TDA* (1996); EU COM *Green Paper* (1996) 570 and at [www.europa.eu.int/comm/development/publicat/l-vert/lv\\_en.htm](http://www.europa.eu.int/comm/development/publicat/l-vert/lv_en.htm); Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 5; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).

<sup>136</sup> Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 24.



development of the economies of South Africa and the EU, as well as of the vastly different relative importance of each party as a competitor in the market of the other.<sup>137</sup> As a result of this meeting, the portfolio committees prepared a concrete submission on the "preparation of a South African Mandate for Negotiation of a Bilateral Trade Agreement with the EU". This outlined the type of agreement the South African parliament would be willing to endorse.<sup>138</sup>

To achieve an agreement with the EU which would have contributed to placing the South African economy on a new development-oriented growth path, an agreement between the EU and South Africa would have had to meet the following objectives:<sup>139</sup>

- The FTA should involve greater asymmetry in content, with the EU eliminating tariffs on a significantly higher volume of trade than South Africa was required to do;
- The concrete benefits from agreement should significantly outweigh the adjustment costs, with these being skewed in favour of the weaker party, South Africa;
- It should take full account of the implications for neighbouring Southern African countries;
- It should involve a period of non-reciprocity before reciprocity kicked in;
- It should address the issue of EU agricultural producer and export subsidies, if countervailing duties were not to remain a feature of trade between the EU and South Africa;
- It should bring about a significant improvement in access to the EU market and narrow the trade imbalance;
- It should distribute costs and benefits in accordance with the different sizes and levels of the respective economies, with the broadest shoulders (EU) bearing the heaviest burdens;
- It should reinforce regional cooperation and integration and create a positive precedent for post Lomé trade relations;

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<sup>137</sup> Portfolio Committees on Agriculture, Water Affairs and Forestry, Foreign Affairs and Trade and Industry *Submission on Preparation of a South Africa Mandate for Negotiations of a Bilateral Trade Agreement with the European Union* (1996) 3.

<sup>138</sup> Goodison *The EU's trade and development policy* (1996) 47.

<sup>139</sup> DTI *Basis for negotiations for a TDA* (1996) 170-179.



- The linkage of a trade agreement with agreements in other areas such as a fisheries agreement should be rejected;
- It should provide an appropriate framework for political dialogue between South Africa and the EU, allowing for the development of close relations in all areas of common interest.

### 2.4.3 SACU submission

In the meantime, the SACU held a workshop in order to investigate the implications of an FTA for Botswana, Lesotho, Namibia and Swaziland. This was followed with a presentation of the research results illustrating the position and opinion of Southern Africa to an EU-SA FTA.<sup>140</sup> Since Article 19 (1) of the SACU agreement grants the BLNS the right to approve or veto any agreement with the EU signed by South Africa, the BLNS countries called upon South Africa to take its interests into account. The following parts were regarded as essential parts of an FTA agreement between the EU and South Africa:<sup>141</sup>

- Regular consultation;
- The exclusion of highly sensitive BLNS products;
- A safeguard clause;<sup>142</sup>
- The incorporation of South African materials and components as local content in BLNS exports to the EU; and lastly
- The maintenance of the trade provisions of the Lomé Convention.

In addition to this regional input, the South African parliament held public hearings on 7 October 1996 regarding the negotiations with the EU. Various submissions from different interest groups were received.<sup>143</sup>

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<sup>140</sup> Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 26.

<sup>141</sup> For an overview of the impact of the EU-SA FTA on the BLNS, see Goodison "Impact of the SA-EU TDCA on the BLNS" *IGD Occasional Paper No 24* (2000) 60-70.

<sup>142</sup> The safeguard clause forms the final line of defence in protecting and defending industries that are deemed to be sensitive to the introduction of free trade. It allows for remedial action in the case of disruption of domestic markets.



## 2.5 Trade and Development Agreement

After the South African Cabinet approved the final negotiation guidelines on 20 November 1996, South Africa presented its initial response to the European offer, a Trade and Development Agreement (TDA), as late as in January 1997.<sup>144</sup> South Africa expressed the view that the TDA had to be seen as complementing the EU–FTA proposal, and outlined the essential issues and changes to be made to the EU proposal to assure an FTA that would be viable for South Africa.<sup>145</sup>

The TDA did not contain detailed negotiating directives but rather pointed out the major issues of dissent between the parties and what changes the South African side wished to be made in the EU's proposal. The TDA proposal differed from the EU's FTA proposal in several areas.<sup>146</sup>

It could be described as a more developmental approach. In general, an agreement with the EU should promote lasting, development-oriented economic growth in South and Southern Africa. Secondly, it emphasised that South Africa's relations with its SACU and SADC partners were ignored in the EU proposals. In the short term, an FTA with the EU would directly impact on the SACU members and the TDA therefore called for an agreement to take account of the needs and interests of SACU. The TDA further emphasised de-linking the trade negotiations from the parallel negotiations on agreements on science and technology, fisheries, wine and spirits, and the Lomé Protocol. Additionally, it proposed that an agreement should be more asymmetrical in content as well as in timing in the phasing in of a trade liberalisation agreement.<sup>147</sup> Asymmetry in time means that a longer phase-in period for the

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<sup>143</sup> Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 27: these interest groups were the South African Chamber of Business, the Afrikaanse Handelsinstituut and different business sectors such as the motor vehicle and clothing industries.

<sup>144</sup> Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 5; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).

<sup>145</sup> Goodison *The EU's Trade and Development Policy* (1996) 46.

<sup>146</sup> See the summary of the proposal in Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 27.

<sup>147</sup> Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 5; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).



elimination of tariffs should be granted to South Africa. Asymmetry in content means that the EU should remove duties from a significantly higher percentage of total trade than South Africa, proportional to the size, strength and level of development of the economies of the two parties.

With these demands, South Africa challenged one of the major principles of the EU mandate, namely that of WTO compatibility. While the EU has argued from the start that this would be incompatible with WTO regulations, South Africa emphasised that strict WTO rules not only do not exist regarding free trade areas between developing and developed countries, but they also do not stipulate that the percentage of free trade has to be the same on either side.<sup>148</sup>

## 2.6 Council Regulation on Development Cooperation with South Africa

In the meantime, on 22 November 1996, the EU Council adopted Regulation (EC) No. 2259/96,<sup>149</sup> the legal base covering development cooperation with South Africa, referring to a financial amount of around 500 million ECU for the European Programme for Reconstruction and Development (EPRD) for the period January 1996 until December 1999. The Regulation also confirmed the commitment of the European Commission to contribute to South Africa's durable economic and social development and to consolidate the foundations laid for a democratic society.<sup>150</sup>

As part of this new trend of developing a more focused approach to development cooperation between the two sides, the South African Government and the European Commission signed a Multi-annual Indicative Programme (MIP) under the EPRD on May 14, 1997. This provided a general framework for development cooperation

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<sup>148</sup> Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 28.

<sup>149</sup> One has to distinguish between directives and regulations. Regulations are described in Article 249 ECT as being general in application, binding in their entirety and directly applicable in all Member States. As such, a regulation will invariably have direct effect. Directives are binding as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. Occasionally, a directive will need national implementation to create a legislative measure which is certain and clear enough to be directly effective.

<sup>150</sup> EU COM *Vorschlag für eine Verordnung des Rates* (1995) 1-7; EU COM *Europäisches Programm für Wiederaufbau und Entwicklung (Ratsverordnung 2259/96) Jahresbericht 1996/1997* (1998) 2-7; EU Council *Verordnung Nr. 2259/96 des Rates vom 22. November 1996 über die Entwicklungszusammenarbeit mit Südafrika* (1996) 1-4;



between the two sides for the following three years. The Agreement, worth 127.5 million € per annum in grants, was signed by Deputy Minister for Finance Gill Marcus and Deputy Director-General Philippe Soubestre.<sup>151</sup>

The Multi-annual Indicative Programme (MIP) focuses on four main priority sectors of assistance. According to Article 2 of the Council Regulation 2259 / 96 these are: support for basic social services such as education, health, water and sanitation; support for private sector development; support for good governance and democratisation programmes; and support for South African participation in SADC regional development initiatives. In addition, human resource development, environmental protection, human rights and gender issues are key elements in all EU development programmes.<sup>152</sup>

Local government, Non-Governmental Organisations (NGOs), community-based organisations and other decentralised cooperation partners will continue to play a central role in the projects implemented within the sectors of the framework agreement. According to the MIP, at least 25% of the resources allocated to the EPRD will be used to finance projects of this kind.<sup>153</sup>

## 2.7 Science and Technology Agreement of December 1996

The Cooperation Agreement on Science and Technology was concluded in December 1996 and it entered into force in November 1997.<sup>154</sup> The Agreement allowed for the participation of South Africa's research teams in all the (non-nuclear) specific programmes of the EC's Fourth Framework Programme, covering the period

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<sup>151</sup> EU COM *Europäisches Programm für Wiederaufbau und Entwicklung in Südafrika* (Ratsverordnung 2259 /96) *Jahresbericht 1998 – Annex 7 MIP* (2000) 2-12.

<sup>152</sup> See Appendix 2 and 3; EU COM *Partners in Progress* (1999) 14; EU COM *Jahresbericht 1998 – Annex 7 MIP* (2000) 3.

<sup>153</sup> At the same time, the two sides also signed a Memorandum of Understanding with the European Investment Bank totaling Euro 375 million in loans. This brought the total to be made available in lending finance to South Africa by the EIB to about Euro 675 million during the period 1995-1999. These loans were to be used to finance productive investment projects and develop South Africa's economic infrastructure.

<sup>154</sup> EU COM *Partners in Progress* (1999) 38; Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 113.



1994-1998.<sup>155</sup> It also provided European researchers with access to similar projects in South Africa. In addition, South Africa participated, and will continue to do so, in a sub-programme specifically designed for scientific and technological cooperation with developing nations (INCO-DEV), funding projects in various fields, including the long-lasting use of renewable natural resources, agricultural and agro-industrial production, health and population.<sup>156</sup>

## 2.8 The progress of negotiations from January 1997 to March 1997

After the presentation of the South African counterproposal of January 1997 (TDA) to the EU, the following rounds of talks in 1997 focused on technical issues.<sup>157</sup> The trade-related issues which were discussed ranged from safeguarding, anti-dumping and countervailing action, intellectual property and competition policy, procurement and the free movement of capital. As a first reaction to the South African criticism on the impact of an FTA on the BLNS countries, the EU acknowledged that an FTA with South Africa could have a negative impact on its customs union neighbours. However, the EU emphasised that the EU-SA FTA would in the long term have a positive effect for Botswana, Lesotho, Namibia and Swaziland. In the view of the EU the removal of tariffs would present an opportunity for the consumers in the BLNS countries to shift to lower cost producers, to thus enjoy significant savings and greater freedom in choosing their import requirements.<sup>158</sup> Regarding sensitive sectors, the EU invited South Africa and the BLNS to submit lists of exclusions, in

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<sup>155</sup> EU COM *Empfehlung für einen Beschluss des Rates über den Abschluß eines Abkommens zwischen der Republik Südafrika und der Europäischen Gemeinschaft über wissenschaftlich-technische Zusammenarbeit* (1996) 4: Every four years the EC develops a new "Framework Programme" in the area of science and technical development. This Framework programme gives the guidelines which areas of technical development will be financially assisted, in order to promote science and technology.

<sup>156</sup> EU COM *Science and Technology Agreement* (1996) 2-3.

<sup>157</sup> Department of Foreign Affairs *Joint Statement on EU/SA Bilateral Agreement* at [www.polity.org.za/govdocs/pr/1997/pr0623a.html](http://www.polity.org.za/govdocs/pr/1997/pr0623a.html) (09.03.2001).

<sup>158</sup> See also Jenkins "Free Trade: South Africa, The SADC and Beyond" *Optima* (January 1998) 10-12. Jenkins presents many arguments on why the TDCA is economically advantageous for South Africa's neighbours.



addition to which the preferences of the Lomé Convention for the BLNS would be sustained.<sup>159</sup>

In February 1997, talks resumed to finalise the terms of South Africa's qualified accession to the Lomé Convention. Spain, however, became a stumbling block to South African Lomé participation as it first wanted a guarantee from South Africa that it would gain access to its fishing waters before it would ratify South Africa's accession to the Convention. Initially, Spain vetoed accession of South Africa but lifted its veto on 25 March under pressure from the other EU member states.<sup>160</sup> Thus the way for South Africa's accession to the Lomé Convention was free.

## **2.9 South Africa's accession to the Lomé Convention in April 1997**

In order to facilitate the process of South Africa's accession a new paragraph to Article 364 of the Lomé Convention was inserted into the revised Lomé IV-bis Convention signed in Mauritius in November 1995. It stipulated that, if an agreement would be reached before the entry into force of the provisions amending the Convention, the ACP-EC Council of Ministers could approve South Africa's membership without the need for separate ratification by the ACP and EU Member States.<sup>161</sup>

The approval was finally given at the meeting of the ACP-EU Joint Council of Ministers' meeting in Luxembourg on 24 - 25 April 1997.<sup>162</sup> The South African Parliament ratified the accession early in October 1997.

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<sup>159</sup> Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 29.

<sup>160</sup> Bertelsmann-Scott *The EU-SA Agreement-Chronology* in: Bertelsmann-Scott, Mills, Sidiropoulos (ed) *The EU-SA Agreement, South Africa, Southern Africa and the European Union* (2000) 132.

<sup>161</sup> Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 132.

<sup>162</sup> EU COM *Empfehlung für einen gemeinsamen Standpunkt des Rates* (1997) 5; EU COM *Partners in Progress* (1999) 38; Bertelsmann-Scott *The EU-SA Agreement-Chronology* (2000) 133.



### 2.9.1 Qualified Membership

However, South Africa's status within the Convention was unusual. In response to the South African request for full accession to the Convention, the EU offered South Africa a "qualified" membership of the Convention, instead of full accession. This meant that certain articles of the Convention would not be applicable to South Africa for the duration of Lomé IV bis.<sup>163</sup>

The most significant of these was the exclusion of South Africa from the general trade regime and special trade protocols of the Convention. This exclusion of South Africa was based on the regulation that the Lomé system of trade preferences was specifically designed to assist the development of some of the world's poorest countries and on the dual nature of the South African economy.<sup>164</sup> For South Africa to obtain membership that would be consistent with the interests of the existing Lomé members, South Africa's trade with the European Union therefore, instead, had to be defined in a separate bilateral trade and cooperation agreement.<sup>165</sup>

### 2.9.2 The legal basis of South Africa's accession to the Lomé Convention

Not only was the way of South Africa's accession to the Lomé Convention and its status within the Convention unusual, but also its legal basis. The idea of "qualified" or "associated" Lomé membership suggested by the EU was completely new. No explicit legal basis was provided for it in the Convention, other than the general provisions of Article 30 of the Lomé Convention. Article 30 (2) (a) of the Lomé Convention empowered the Council of Ministers to take any political decision for the attainment of the objectives of the Convention.

As the decision to grant South Africa partial, but not full, membership of the Convention was indeed a political decision and, according to the EU, necessary for

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<sup>163</sup> For the Articles applicable and not applicable to South Africa, see Chapter 2.9.3; EU COM *Empfehlung für einen gemeinsamen Standpunkt des Rates* (1997) 5.

<sup>164</sup> The issue of South Africa's status as a developed country was examined at 2.2.4.1; EU COM "South Africa" *The Courier* No 164 (1997) 3; Lowe "Combat poverty" *The Courier* No 169 (1998) 3; EU COM *Partners in Progress* (1999) 25.

<sup>165</sup> EU COM *Partners in Progress* (1999) 25; EU COM "South Africa" *The Courier* No 164 (1997) 3.



the attainment of its objectives, Article 30 (2) of the Lomé Convention was the suitable basis.<sup>166</sup>

### **2.9.3 Main terms and conditions of South Africa's accession to the Lomé Convention**

#### **2.9.3.1 Articles applicable to South Africa**

The articles of the Lomé Convention applicable to South Africa concern technical cooperation (Arts. 275-280), cultural and social cooperation (Arts. 139-155), regional cooperation (Arts. 156-166), industrial development (Arts. 77-98), and investment promotion and protection (Arts. 258-274). It would furthermore participate in the institutions of the Convention, the Joint ACP-EC Council of Ministers, the Committee of Ambassadors and the Joint Assembly (Arts. 338-355), and would be eligible for tenders for projects in all ACP countries financed from the 8<sup>th</sup> European Development Fund (EDF), but excluding the preferential ACP treatment.<sup>167</sup>

#### **2.9.3.2 Articles not applicable to South Africa**

South Africa, however, would not benefit from the general trade arrangements (Arts. 167-185), the special protocol on bananas (Protocol 5), rum (Protocol 6), beef and veal (Protocol 7), sugar (Protocol 8), and coal and steel products (Protocol 9). Furthermore, the commodity-specific provisions, especially the System for the Stabilisation of Export Earnings for Agricultural Products (STABEX, Arts. 186-212) and the System for Stabilisation of Export Earnings for Mining Products (SYSMIN, Arts. 214-219), the structural adjustment support (Arts. 239-250), and the EDF resources (except in the case of refugee assistance) would not be applicable to South Africa. South Africa preferred to continue receiving financial assistance

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<sup>166</sup> Holland "SA, SADC and the EU" *Journal of Modern African Studies* (1995) 280.

<sup>167</sup> EU COM *Partners in Progress* (1999) 25; EU COM *EU-SA Trade and Economic Cooperation* at [www.eusa.org.za/EU-SA Trade&Economic Coop/Free Trade Agreement.htm](http://www.eusa.org.za/EU-SA%20Trade&Economic%20Coop/Free%20Trade%20Agreement.htm), 4 (looked up 14.08. 2000); EU COM "South Africa" *The Courier No 164* (1997) 2-3; Article 303 of the Lomé Convention gives a 10% price preference to ACP tenders for work contracts of less than 5 million ECU. For supplies contracts the preference is 15%; see Chapters 2.2.1 and 2.3 for further explanation of the EDF.



through the European Programme for Reconstruction and Development, which is funded directly from the Community budget.<sup>168</sup>

The EU-funded initiatives such as STABEX, which compensates countries that are heavily dependent on one or more staple products for severe fluctuations in their export earnings, or SYSMIN, which provides finance for the upkeep or reconstruction of mining installations during periods when their operation is curtailed by unforeseen circumstances, have proved invaluable to a number of ACP states. For the period 1995-2000, the EU has earmarked funds totaling more than R 80 billion for development aid programmes to the ACP states.<sup>169</sup>

The fact that these funds would not be applicable to South Africa as a qualified member of the Lomé Convention, clearly underlines the EU's intention with regard to a new future framework of cooperation with the ACP countries, which would take into account the varying needs of countries and regional peculiarities.<sup>170</sup> As the EU admitted in its Green Paper of November 1996, the principle of partnership under the Lomé Convention has only been put into practice partly. Aid dependency, coping with short-term needs, and dialogue on economic and social policies have proved difficult to put into practice with countries with little institutional capacity, with the result that partnership was limited to day-to-day resource management.<sup>171</sup> Concerning financial cooperation, the fact that some financial resources were granted automatically, and the EU's tendency to take the initiative away from its weaker partners, have not encouraged ACP governments to display the genuine political commitment expected of them.<sup>172</sup> For these reasons, the EU in its Green Paper stressed that future cooperation could include a general overall agreement, with individual bilateral agreements, with each of the ACP states, and the splitting of the Lomé Convention into regional agreements because of the differences in needs and levels of development amongst the ACP states.<sup>173</sup>

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<sup>168</sup> EU COM *Partners in Progress* (1999) 25; EU COM "South Africa" *The Courier* No 164 (1997) 2-3.

<sup>169</sup> Links *The EU and Southern Africa* (1998) 61.

<sup>170</sup> Links *The EU and Southern Africa* (1998) 68.

<sup>171</sup> EU COM *Green Paper* (1996) IV.

<sup>172</sup> EU COM *Green Paper* (1996) V; see Chapter 2.12 for further explanation of the negative aspects of the Lomé Convention.

<sup>173</sup> EU COM *Green Paper* (1996) VIII; see Chapter 2.12 for further explanation of the Cotonou Agreement.



Thus, the exclusion of South Africa from certain EU-funded initiatives and the proposal for a trade agreement had to be seen as an example of future cooperation with other ACP states.

## 2.10 The Continuation of Negotiations on the TDCA in October 1997

After the South African parliament ratified the partial accession to the Lomé Convention early in October 1997, the negotiators of the two parties could concentrate exclusively on the FTA.<sup>174</sup> For this reason, it was initially hoped that the talks would be concluded swiftly.

However, once Minister Alec Erwin, on behalf of the Republic of South Africa, presented a detailed line-by-line trade offer to the EU in November 1997,<sup>175</sup> the negotiating process gathered momentum at the end of 1997.<sup>176</sup> This offer was prepared in consultation with the neighbouring BLNS states. The initial offer covered 80% of current South African imports from the EU and liberalisation was scheduled within a period of twelve years. The remaining 20% of trade, consisting of nearly 2500 tariff lines, was set aside in ten different protocols.<sup>177</sup>

In January 1998, Professor Pinheiro tabled the EU's corresponding offer on behalf of the European Commission.<sup>178</sup> It was a line-by-line elaboration of the overall trade proposal introduced to South Africa in March 1996. It included all traded and non-traded products, and covered 90% of South African exports to the EU. The agricultural exclusions listed in the negotiating directives approved by the Council in March 1996, as well as an additional 4% of current trade for which the tariff treatment was yet to be determined, were left aside.<sup>179</sup>

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<sup>174</sup> However, to fully participate in the institutions and to take advantage of the preferences of the Convention, South Africa had to wait until the revised Lomé IV agreement was in operation. Lomé IV needed to be ratified by a two-thirds majority of the ACP states and all EU Member States and this did not happen before 1998.

<sup>175</sup> EU COM *Partners in Progress* (1999) 39; Links *The EU and Southern Africa* (1998) 67; Department of Foreign Affairs *Joint Statement on EU/SA Bilateral Agreement* (1997) 1; [www.polity.org.za/govdocs/pr/1997/pr0623a.html](http://www.polity.org.za/govdocs/pr/1997/pr0623a.html) (09.03.2001).

<sup>176</sup> EU COM *Partners in Progress* (1999) 39; Davies *Forging a new relationship with the EU* (2000) 8.

<sup>177</sup> [www.eusa.org.za/EU-SA Trade&Economic Coop/Free Trade Agreement.htm](http://www.eusa.org.za/EU-SA%20Trade&Economic%20Coop/Free%20Trade%20Agreement.htm), 8 (14.08.2000).

<sup>178</sup> Davies *Forging a new relationship with the EU* (2000) 8; EU COM *Partners in Progress* (1999) 39.

<sup>179</sup> [www.eusa.org.za/EU-SA Trade&Economic Coop/Free Trade Agreement.htm](http://www.eusa.org.za/EU-SA%20Trade&Economic%20Coop/Free%20Trade%20Agreement.htm), 8 (14.08.2000).



The following five negotiating rounds that took place in 1998 were characterised by postponed deadlines, threats to pull out of the talks and a general feeling that the agreement would take many months to be concluded. On the one side, South Africa was concerned about the agricultural coverage of the deal, which they believed to be too paltry. On the other side, the EU was concerned about South Africa's insistence on compensation for the loss of fiscal revenue in the neighbouring BLNS states as a result of the Agreement.<sup>180</sup>

## **2.11 The provisional entry into force of the TDCA and the continuous negotiations on the Wine and Spirits Agreement**

The EU's demand that South Africa should phase out the use of the terms "Port" and "Sherry" in the internal market emerged as the most serious threat to concluding the EU-SA TDCA in December 1998.<sup>181</sup> A number of constituencies in Europe wanted South Africa to phase out the usage of the names "Port" and "Sherry" for the country's fortified wines. They argued that these terms refer to geographical locations in Portugal and Spain and should, therefore, be used exclusively by these two countries.<sup>182</sup> South African producers have, however, used the names for generations<sup>183</sup> and were only willing to remove the name from exports to third countries, but not on bottles sold on the domestic market.<sup>184</sup>

After 43 months and 21 rounds of talks, the two chief negotiators, South Africa's Trade and Industry Minister Erwin and EU Commissioner Professor Pinheiro, reached a political compromise on wine and on Port and Sherry in January 1999 at

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<sup>180</sup> Bertelsmann-Scott *The EU-SA Agreement-Chronology* (2000) 133; Mbekeani *Impact of the SA-EU TDCA on the BLNS* in: IGD Occasional Paper No 24 (ed) *Regionalism and a Post-Lomé Convention Trade Regime: Implications for Southern Africa – Proceedings of a workshop organized by the Institute for Global Dialogue, Friedrich Ebert Stiftung and the French Institute of South Africa* (2000) 54; Because of their common external tariff with South Africa through the Southern Africa Customs Union, the agreement means that the BLNS countries are obliged to accept a de facto FTA with the EU. They stand to lose a significant portion of their fiscal revenue. See Chapter 4.2.1.4.2, for a detailed explanation of this issue.

<sup>181</sup> Bertelsmann-Scott *The EU-SA Agreement-Chronology* (2000) 134.

<sup>182</sup> A detailed examination of the Port and Sherry issue is given in Chapter 5; [www.findarticles.com/cf\\_0/m0WXI/2368/53412434/pl/article.html](http://www.findarticles.com/cf_0/m0WXI/2368/53412434/pl/article.html) (15.03.2001);

<sup>183</sup> Hofmeyr "Port and Sherry still under debate - EU deal possible" *Farmer's Weekly* (1999-02-12) 38-39; Dispatch online *EU: only Spain can produce "Sherry"* at [www.dispatch.co.za/1998/09/21/southafrica/SHERRY.HTM](http://www.dispatch.co.za/1998/09/21/southafrica/SHERRY.HTM) (15.03.2001).

<sup>184</sup> [www.findarticles.com/cf\\_0/m0WXI/2368/53412434/pl/article.html](http://www.findarticles.com/cf_0/m0WXI/2368/53412434/pl/article.html) (15.03.2001).



Davos, Switzerland.<sup>185</sup> The Davos text, however, was not approved by EU Foreign Ministers at a meeting in February, mainly because several countries, led by Spain, were dissatisfied with provisions relating to Port and Sherry appellations. Intense diplomacy, and some small amendments to the Davos text, finally secured approval by the EU heads of states and governments in Berlin at the end of March 1999.<sup>186</sup> In July 1999, the Council of the European Union, on behalf of the Community, decided to approve the TDCA between the EU and South Africa provisionally. South Africa gave its approval of the TDCA according to § 231 of its 1996 Constitution.<sup>187</sup>

The Port and Sherry issue reoccurred hours before the signing of the Agreement in October 1999, as Portugal and Spain tried to veto the signing of the TDCA. They insisted on a complete phasing out of the words for South African products and argued that South Africa was trying to rediscuss the terms of the agreement, namely

<sup>185</sup> See the compromise package on Port and Sherry infra Chapter 3.1.9.2 and Appendix X of the TDCA at [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); DTI TDCA (1999) 9; [www.findarticles.com/cf\\_0/m0WXI/1999\\_Feb\\_3/53711311.jhtml](http://www.findarticles.com/cf_0/m0WXI/1999_Feb_3/53711311.jhtml) (15.03.2001); Bertelsmann-Scott "The EU, SA and the FTA" SAYII (2000) 116.

<sup>186</sup> Davies Forging a new relationship with the EU (2000) 8; EU COM *Development and Cooperation Agreement between the European Union and the Republic of South Africa has been approved yesterday by the EU heads of State and Governments* (1999) 1 at [www.oneworld.org/owe/news/rapid/9195\\_en.htm](http://www.oneworld.org/owe/news/rapid/9195_en.htm) (09.03.2001).

<sup>187</sup> The European Communities Council Decision of 29 July 1999 concerning the provisional application of the TDCA between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part (1999) L 311/1; In the EU the procedure for the conclusion of an agreement is provided for in Article 300 ECT. According to this procedure, an agreement has to be approved by the Council of the EU and the assent of the European Parliament has to be obtained. Since the fifteen EU Member States are also contracting parties, they have to ratify the agreement according to their respective constitutional requirements.

Interview with Theminkosi Ngeleza, Assistant Director: European Union Desk, Trade negotiations sub-division, International Trade and Economic Division at the DTI of the RSA (02 June 2001): In South African law, the rules governing the conclusion and implementation of treaties are determined by § 231 (1) of the 1996 Constitution. According to § 231(1) the negotiating and signing of all international agreements is the responsibility of the national executive. The main actors in the negotiating process on behalf of the South African executive were Minister of Trade and Industry, Trevor Manuel, followed by Alec Erwin as well as the ambassador to the EU Neill van Heerden, followed by Elias Links.

§ 231 (2) of the Constitution stipulates that an international agreement binds the Republic in principle only after having been approved by resolution, both in the National Assembly and the National Council of Provinces. Furthermore § 231 (4) of the Constitution stipulates that any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. The TDCA does not contain such self-executing provision and therefore requires an Act of Parliament to become law.

The TDCA was ratified by the Parliament in November 1999 and was published as a legislation in the Government Notice No 20763 of 30 December 1999. See DTI *The EU/SA Trade, Development and Cooperation Agreement* at [www.dti.gov.za/review.asp?iSDivID=84&iEventID=161](http://www.dti.gov.za/review.asp?iSDivID=84&iEventID=161) (01.06.2001).



regarding the use of the "Port" and Sherry" geographical denominations.<sup>188</sup> South Africa, however, pointed out that the EU has no more right than South Africa on some types of denominations and that those issues might need more time for arriving at a compromise.<sup>189</sup> Portugal's and Spain's bid failed, however, and the TDCA between South Africa and the EU was signed in Pretoria on 11 October 1999.<sup>190</sup>

After the signing ceremony South Africa's Chief Director for Foreign Trade relations, Bahle Sibisi, pointed out that, although South Africa and the EU had signed the deal, negotiations would continue on the contentious Wine and Spirits Agreement. In the opinion of South Africa's Ambassador to the EU, Elias Links, South Africa went only so far as to agree to dialogue on the issue.<sup>191</sup>

The negotiations on the Wine and Spirits Agreement could not proceed any further. Greece and Italy argued that their two national liquors "Ouzo" and "Grappa" should also be covered in the pact after South Africa had agreed earlier to phase out the use of "Port" and "Sherry" on its spirits, as demanded by Portugal and Spain. Otherwise, they contended, the Italian and the Greek parliament would not ratify the wine and spirits agreement.<sup>192</sup> As a reaction to those demands several EU governments publicly criticised Rome and Athens for making an issue over the brand names, because Ouzo is not even manufactured in South Africa and only 30 000 bottles of Grappa are produced in South Africa each year.<sup>193</sup> The South African Trade Minister, Alec Erwin, would not bow to the demands by Greece and Italy and called the whole dispute "bizarre".<sup>194</sup> Consequently, although the Wine and Spirits Agreement was supposed to be finalised before the entry into force of the overall agreement, no solution could be reached on the dispute over names. Therefore the overall

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<sup>188</sup> Bertelsmann-Scott *The EU-SA Agreement-Chronology* (2000) 135.

<sup>189</sup> European Information Centre *EU/SA : Last-Minute Pressure on EU SA Trade Pact, Signing Ceremony Approaches* at [www.findarticles.com/cf\\_0/m0WXI/1999\\_oct\\_9/56196133/html](http://www.findarticles.com/cf_0/m0WXI/1999_oct_9/56196133/html) (15.03.2001).

<sup>190</sup> EU COM *Agreement in the Form of an exchange of letters* (1999) L 311/2.

<sup>191</sup> Moyo "EU-SA Trade pact clinched, wine dispute lingers" *The Namibian* (1999-10-12) 1.

<sup>192</sup> The Namibian *SA says it wont be bullied by EU over liquor names* at [www.namibian.com.na/Netstories/2000/February/Marketplace/bullied.html](http://www.namibian.com.na/Netstories/2000/February/Marketplace/bullied.html) (15.03.2001); European Information Service *Wines and Spirits Agreement Deadlock Threatens Again EU-SA Free Trade Pact* at [www.findarticles.com/cf\\_0/m0WXI/1999\\_oct-30/57098298/p1/article.html](http://www.findarticles.com/cf_0/m0WXI/1999_oct-30/57098298/p1/article.html) (15.03.2001).

<sup>193</sup> Black "South Africa and EU end trade row" *Daily Mail & Guardian* (2000-02-18) 1.

<sup>194</sup> [www.namibian.com.na/Netstories/2000/February/Marketplace/bullied.html](http://www.namibian.com.na/Netstories/2000/February/Marketplace/bullied.html) (15.03.2001)



agreement between the EU and South Africa provisionally entered into force on 1 January 2000, excluding its provisions on wines and spirits.<sup>195</sup>

After weeks of further intensive negotiations over the Wine and Spirits Agreement, South Africa agreed to phase out the names "grappa" and "ouzo" within five years. However, it was agreed that, after a period of twelve years, new denominations to be used in South Africa instead of the old ones would be agreed on jointly.<sup>196</sup> Moreover, South Africa, in return, demanded that the EU-South Africa agreement clearly state that final say on the geographical denominations rests with the WTO under the Agreement on Trade Related Aspects of Intellectual Property.<sup>197</sup>

As a result of the South African agreement to refrain from using the demanded terms on its export market after five years and on its domestic market after twelve years, the two parties were close to reaching the final implementation of the Wine and Spirits Agreement into the overall agreement in September 2000.<sup>198</sup> But once again the planned conclusion of the Wine and Spirits Agreement was delayed by outstanding procedural issues. EU officials accused South Africa of refusing "to adopt the texts as they stand" and that they therefore had to continue the negotiations before concluding the agreement. The director for bilateral trade at the South African Department of Trade, Tshediso Matona, said that South Africa, however, wanted to see major changes and clarifications before it would sign the agreement.<sup>199</sup>

Since this last disagreement, the parties have not been able to conclude a deal on the wine and spirits issue. According to the South African National Department of

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<sup>195</sup> [www.eusa.org.za/EU-SA Trade&Economic Coop/Free Trade Agreement.htm](http://www.eusa.org.za/EU-SA%20Trade&Economic%20Coop/Free%20Trade%20Agreement.htm), 8 (14.08.2000); Bertelsmann-Scott *The EU-SA Agreement-Chronology* (2000) 135; EU COM *Partners in Progress* (1999) 39; DTI *Statement by the Minister of Trade and Industry, Alec Erwin, on the TDCA between South Africa and the European Union* at [www.dti.gov.za/review.asp?uSDivID=1&iEvent\\_ID=74](http://www.dti.gov.za/review.asp?uSDivID=1&iEvent_ID=74)

<sup>196</sup> Black "SA and EU" *Daily Mail & Guardian* (2000-02-18) 2; International Centre for Trade and Lasting Development *News from the regions: EU-S. Africa Deal; Asia* at [www.ictsd.org/html.weekly/story4.29-02-00.htm](http://www.ictsd.org/html.weekly/story4.29-02-00.htm) (15.03.2001); Hofmeyr "Port and Sherry still under debate" *Farmer's Weekly* (1999-02-12) 39.

<sup>197</sup> [www.ictsd.org/html.weekly/story4.29-02-00.htm](http://www.ictsd.org/html.weekly/story4.29-02-00.htm) (15.03.2001).

<sup>198</sup> EU COM *European Commission welcomes completion of the negotiations on the wine and spirits agreement between the EU and South Africa* at [www.europa.eu.int/comm/trade/whats\\_new/index\\_en.htm](http://www.europa.eu.int/comm/trade/whats_new/index_en.htm) (12.03.2001).

<sup>199</sup> The Namibian *EU-SA free trade agreement goes back to drawing board* at [www.namibian.com.na/Netstories/2000/July/Marketplace/00928E5E61.html](http://www.namibian.com.na/Netstories/2000/July/Marketplace/00928E5E61.html) (15.03.2001).



Agriculture, the EU and South Africa still differ on negotiating the final quotas of the Wine and Spirits Agreement and further talks are expected during June 2001.<sup>200</sup>

## **2.12 The expiry of the Lomé Convention and the conclusion of the Cotonou Agreement**

Although the EU and South Africa could reach agreement on the TDCA and on the separate agreements besides the wine and spirits agreement,<sup>201</sup> one may not neglect to view this agreement from the global perspective of the future EU-ACP cooperation.

This cooperation was governed by the Lomé Convention from 1975 until February 2000 and was succeeded by the Cotonou Agreement in February 2000. The entry into force of the TDCA in January 2000 and the expiry of the Lomé Convention one month later raises the questions of how the Lomé Convention had been intended to benefit the ACP countries, why it had not done so and why the new Cotonou Agreement had therefore come about.

The trade and development aid provisions of the Lomé accord undoubtedly represented its most important aspects. The Convention provided for duty-free access to the EU for almost all products of the ACP countries, without any reciprocal access being required. The main exceptions to qualifying for this preferential treatment were agricultural products that constitute direct competition for EU products that are protected by the Common Agricultural Policy. The Convention also governed the granting of development aid to the ACP countries from the European Development Fund (EDF) funded by individual contributions from the EU Member States, as well as low-interest loans from the European Investment Bank.<sup>202</sup>

From the point of view of both Graumans and Links, however, it cannot be denied that political stability and/or economic conditions in a number of ACP states have not

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<sup>200</sup> Interview with Ben van Wyk, Director: Economy and Policy Analysis at the South African National Department of Agriculture (2001-03-23).

<sup>201</sup> See the previous Chapters 2.10 and 2.11.

<sup>202</sup> Links *The EU and Southern Africa* (1998) 59.



improved markedly since 1975, despite the well-intentioned aims of the Convention and the generous benefits it affords. The four Lomé Conventions did not lead to an increase in ACP exports to the European Union. In fact, ACP exports to the European market have declined and many ACP economies have remained dependent on commodity exports.<sup>203</sup> Even the EU, as early as in November 1996, admitted in its Green Paper that the principle of partnership under the Lomé Convention had only been put into practice partly. Aid dependency, coping with short-term needs, and dialogue on economic and social policies proved difficult to put into practice with countries with little institutional capacity, with the result that partnership was limited to day-to-day resource management.<sup>204</sup> As far as financial cooperation is concerned, the EU's tendency to take the initiative away from its weaker partners, together with the fact that some financial resources were granted automatically, have not encouraged ACP governments to display the genuine political commitment expected of them.<sup>205</sup>

Stated briefly, what is widely accepted in Europe, and this also reflects my opinion, is that the Convention has failed to achieve its objectives.<sup>206</sup> Influenced by these rather disappointing results, the European Commission came to consider a non-reciprocal trade relationship between the EU and the ACP countries to be incompatible with WTO rules, and argued that they would not be able to arrange another ten-year waiver for the Convention.<sup>207</sup>

Thus, the EU was eager to commence a new trade relationship with the ACP on a reciprocal basis.<sup>208</sup>

At the joint ministerial conference in Brussels on 2 and 3 February 2000, the ACP states and the EU member states succeeded in reaching agreement on the future

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<sup>203</sup> Graumans "SADC / EU Cooperation" *FDG Occasional Paper No 11* (1997) 8; Links *The EU and Southern Africa* (1998) 60; The exception, however, is the undoubted successes of, for example, Botswana, Mauritius and Namibia.

<sup>204</sup> EU COM *Green Paper* (1996) IV.

<sup>205</sup> EU COM *Green Paper* (1996) V; see Chapter 2.12 for further explanation of the negative aspects of Lomé.

<sup>206</sup> Links *The EU and Southern Africa* (1998) 59-60.

<sup>207</sup> Maasdorp "Study on the impact of introducing reciprocity into trade relations between the EU and the SADC region" *IGD Occasional Paper No 21* (1999) 16.

<sup>208</sup> Maasdorp "Study on the impact of introducing reciprocity into trade relations between the EU and the SADC" *IGD Occasional Paper No 21* (1999) 16.



terms of cooperation between them, to replace the Lomé Convention.<sup>209</sup> According to Part one, Title I, Chapter 1, Article 1 of the new ACP-EC partnership "Cotonou Agreement" concluded in Brussels and signed in Cotonou in June 2000 for a period of twenty years (2000-2020), contains a completely reformed aid package to support development and poverty reduction policies, plans for new economic partnerships to harness regional growth and a political commitment to promote good governance and stability.<sup>210</sup>

According to previous custom, the new partnership agreement between ACP states and the Community, along with its five-year financial protocol, will be revised every five years. The financial protocol regulates the European Development Fund (EDF), which is financed from EU member state contributions.<sup>211</sup>

The first protocol of the new agreement (9<sup>th</sup> EDF 2000-2005) amounts to Euro 13.5 billion. In addition, Euro 9.5 billion of uncommitted funds from previous EDFs will supplement the new fund. A seven-year deadline has been set for its disbursal. The 9<sup>th</sup> EDF will be boosted further by a pledge of up to Euro 1.7 billion in loans from the European Investment Bank's own resources.<sup>212</sup>

The new agreement and the changes that it implements are based on five interlinking central pillars, which will govern cooperation between the EU and the ACP states.<sup>213</sup>

The five central pillars of the Cotonou Agreement are:<sup>214</sup>

- An enhanced political dimension,

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<sup>209</sup> Morrissey "Post Lomé – new partnership agreed" *The Courier No 179* (2000) 5.

<sup>210</sup> Cotonou Agreement (2000) 8; International Centre for Trade and Sustainable Development ACP, *EU sign Cotonou Agreement on Trade, Aid and Sustainable Development To Replace Lomé* at [www.ictsd.com/html/weekly/story1.27.06-00.htm](http://www.ictsd.com/html/weekly/story1.27.06-00.htm) (09.03.2001); [www.europa.eu.int/comm/development/cotonou/index\\_en.htm](http://www.europa.eu.int/comm/development/cotonou/index_en.htm).

<sup>211</sup> Morrissey "Post Lomé – new partnership agreed" *The Courier No 179* (2000) 5; [www.ictsd.com/html/weekly/story1.27.06-00.htm](http://www.ictsd.com/html/weekly/story1.27.06-00.htm) (09.03.2001); [www.europa.eu.int/comm/development/cotonou/index\\_en.htm](http://www.europa.eu.int/comm/development/cotonou/index_en.htm).

<sup>212</sup> Morrissey "Post Lomé" *The Courier No 179* (2000) 5; [www.ictsd.com/html/weekly/story1.27.06-00.htm](http://www.ictsd.com/html/weekly/story1.27.06-00.htm) (09.03.2001); [www.europa.eu.int/comm/development/cotonou/index\\_en.htm](http://www.europa.eu.int/comm/development/cotonou/index_en.htm).

<sup>213</sup> EU COM *The Cotonou Agreement* at [www.europa.eu.int/comm/development/cotonou/index\\_en.htm](http://www.europa.eu.int/comm/development/cotonou/index_en.htm) (09.03.2001).

<sup>214</sup> [www.europa.eu.int/comm/development/cotonou/index\\_en.htm](http://www.europa.eu.int/comm/development/cotonou/index_en.htm) (09.03.2001); [www.ictsd.com/html/weekly/story1.27.06-00.htm](http://www.ictsd.com/html/weekly/story1.27.06-00.htm) (09.03.2001).



- Increased participation,
- Poverty reduction as an overarching objective,
- Reinforced economic and trade relationships,
- Improved financial cooperation.

With regard to South Africa, the qualifications concerning South Africa's participation in the Cotonou Agreement are set out in Protocol 3, Article 1 of the Cotonou Agreement. According to Protocol 3, Article 1 (2) of the Cotonou Agreement, the TDCA between the EU and South Africa is to take precedence over the provisions of the Cotonou Agreement. According to Article 7 of the Cotonou Agreement, Protocol 3 is open to revision. It is adjoined to the new accord saying that its political and development strategies will be 'broadly applicable' to South Africa, as at present, but not to trade nor development funds. South Africa, however, is expected to be involved in the negotiations on future regional economic partnerships (REPAs).<sup>215</sup>

These REPAs will replace existing non-reciprocal trade preferences that will follow an eight-year transition period lasting from 2000 to 2008. An application for a waiver from the WTO for this period has already been filed in Geneva. The REPAs would be entered into with different ACP regions or countries. Essentially, they would be free trade area arrangements, but with added benefits for the ACP countries, and would include provisions for economic cooperation. In principle, ACP partners in the REPAs will retain their current preferential access to European markets but will have to reciprocate by progressively opening up their own markets to European imports on a preferential basis. ACP least developed countries could retain current non-reciprocal trade preferences, should they choose not to join free trade area arrangements with the EU. Formal negotiations on the REPAs should begin by September 2002 at the latest. Regional bodies can select to form REPAs with the EU entirely by choice. Until these are in place, the EU intends to provide support for regional integration and to offer technical support to conduct the negotiations to the ACP countries. In 2004, the situation of ACP countries that are not in a position to enter into a REPA, will be assessed and alternatives will be sought. According to the EU, the new trading arrangements will enter into force by January 2008 at the latest.

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<sup>215</sup> See Appendix 7.



Trade liberalisation will begin in 2008, with a long transitional period, for instance, of twelve years.<sup>216</sup>

When the EU and South Africa were concluding the TDCA in 1999, the EU and the ACP countries thus, during the same period of time, were concluding an agreement that provides for the establishment of free trade area agreements.

## 2.13 Conclusion

Although it took 43 months and 21 rounds of negotiations to conclude the TDCA, the negotiations illustrated quite clearly how difficult it could be to reach agreements in the future between two countries with different levels of development.

The South African positioning in the course of the negotiations over the TDCA has been seen as ambiguous: on the one hand it took the "poor man" line with its application to become a member of the Lomé Convention and tried to convince the EU that it forms part of a poor region in desperate need of development aid. On the other hand South Africa expected to be seen as a hopeful, economically strong country worthy of attracting large amounts of direct European investment. Furthermore, South Africa always tried to uphold the importance of the regional dimension in the negotiations, thereby indicating its will to act as the leading economical and political power in Southern Africa.

The EU's position had the eventual integration of the global economy as its objective. Its rejection of South Africa's request to enter the Lomé Convention and its Green Paper of November 1996 clearly illustrated the EU's position that aid dependency and coping with short-term needs is day-to-day resource management rather than effective development aid.<sup>217</sup> Thus the EU was eager to commence a new trade relationship with South Africa on a reciprocal basis, as an example for future cooperation with the ACP countries. The Cotonou Agreement, which replaced the Lomé Convention, provides for increased participation and improved financial cooperation, as well as economic and trade relationships between the EU and ACP

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<sup>216</sup> EU COM *Partnership for the new millennium* (2000) 4-5.

<sup>217</sup> EU COM *Green Paper* (1996) IV.



countries and could be a first step to future cooperation between the EU and other ACP countries on the basis of individual bilateral agreements.

Nevertheless, the negotiations with South Africa clearly demonstrated that Europe is far from following a common purpose and that individual countries' special interests still play an important role. Concessions from the EU remain hard to win, particularly in the agricultural sector. This is especially so because the EU is currently undergoing a series of radical reforms with regard to its financing, farm and regional spending (Agenda 2000). In addition, the integration of the Eastern European Countries entering the Union is a huge and difficult task.

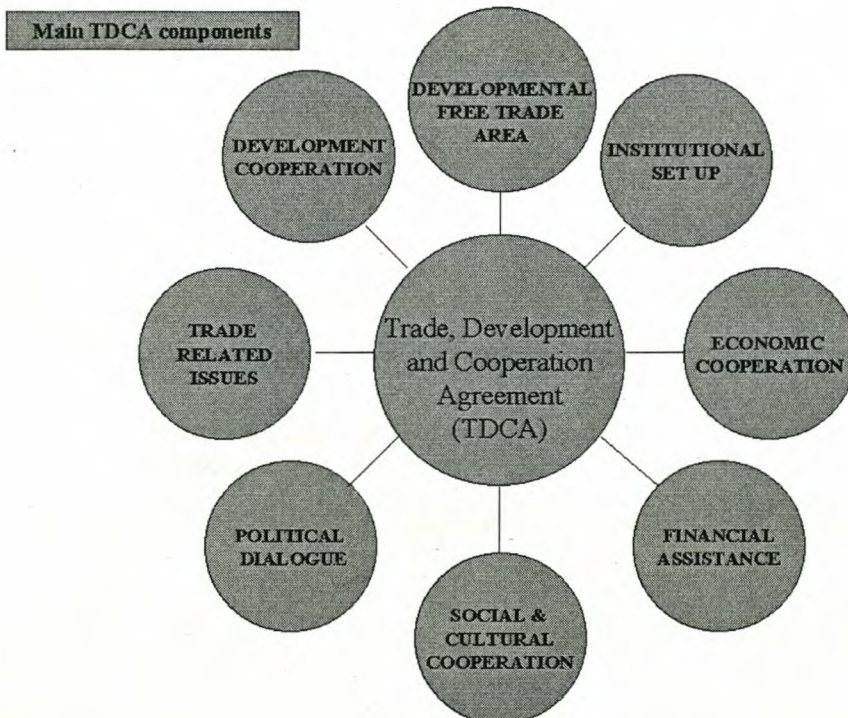
Therefore one has to bear in mind that the focus in future could be more on these problems than on accommodating the interests of African countries.



### 3. The Trade, Development and Cooperation Agreement

The Trade, Development and Cooperation Agreement (TDCA) between the RSA and the EU provisionally entered into force on 1 January 2000. To examine the results of twenty-one rounds of negotiation, this chapter will present the components of the agreement.

The TDCA covers a wide range of issues in a comprehensive field of cooperation and consists of several components. These are:<sup>218</sup>



#### 3.1 The components of the Agreement

##### 3.1.1 Political Dialogue

One of the major stumbling blocks to the conclusion of the agreement was the non-execution provision. The non-execution clause allows either party to discontinue of

<sup>218</sup> Bertelsmann-Scott "The EU, SA and the FTA" SAYII (2000) 113; EU COM *Partners in Progress* (1999) 5; DTI *TDCA* (1999) 2; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 4-10; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).



the agreement. The EU wanted to include this provision in the agreement in form of a clause that would allow the discontinuation of the agreement if South Africa should violate the rule of law and good governance or the respect for democratic principles and fundamental human rights as laid down in the Universal Declaration on Human Rights.<sup>219</sup> The EU traditionally includes the first three conditions in any agreement it concludes. This has led to the collapse of a number of trade talks involving the EU. Most recently, the EU failed to reach an agreement with Australia, as these clauses were found unacceptable. The inclusion of a "good governance" clause, however, is a new stipulation which is probably aimed at future agreements with the ACP countries. It is a clause that was included for the first time in Lomé IV to promote democracy and accountability in developing countries.<sup>220</sup>

SA, however, took exception to the inclusion of this clause, as it feared that this would lead to the unilateral definition of these concepts by the EU.<sup>221</sup> In addition, it feared that the EU was setting a precedent for the Lomé negotiations that could impact negatively on its partners in the region at the time.<sup>222</sup> Although all four clauses were later included, Article 3 TDCA allows for consultation before suspension in the event of the violation of these principles by either of the two parties.<sup>223</sup>

The political dialogue will take place at ministerial and other levels. On general matters of foreign policy, particularly with a view to promoting peace and long-term stability in Southern Africa, the political dialogue could be extended to include all countries in the SADC region.<sup>224</sup>

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<sup>219</sup> Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 114; DTI *TDCA* (1999) 2; EU COM *TDCA between the EU and RSA* (1999) 2-4; these principles engage either party to behave according to the law as it stands, and to govern in a way that is in line with the principles of democratic rights, such as the freedom of the people and the right to vote.

<sup>220</sup> EU COM "La Convention de Lomé IV" *Le Courier No 155* (1996) 9; Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 114; Bertelsmann-Scott, Mills & Gibb *The EU-SA Agreement* (2000) 26.

<sup>221</sup> DTI *TDCA* (1999) 2.

<sup>222</sup> Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 114.

<sup>223</sup> EU COM *TDCA between the EU and RSA* (1999) 3; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 114; DTI *TDCA* (1999) 2.

<sup>224</sup> [www.eusa.org.za/EU-SA Trade&Economic Coop\Free Trade Agreement.htm](http://www.eusa.org.za/EU-SA Trade&Economic Coop\Free Trade Agreement.htm), 6 (14.08.2000).



### 3.1.2 Provisions for a Free Trade Area

#### 3.1.2.1 General Features

In June 1997, SA called for a free trade area with asymmetrical coverage of all trade and sectors and special protocols to cover sensitive products. It also called for development and financial measures to support further regional integration and to facilitate the adjustment process in Southern Africa.<sup>225</sup>

The agreement concluded between South Africa and the EU lays out in detail the steps to be taken with regard to the removal of tariffs on mutual trade in order to establish a free trade area. The following general aspects in respect of the establishment of a free trade area were agreed upon:

- Coverage of the Free Trade Area, Asymmetry and Differentiation

According to Article 5 TDCA, 94,9% of EU imports from South Africa will effectively enter into the market free of duty by the end of the ten-year period. The respective figures on the South African side are 86,3% and twelve years.<sup>226</sup>

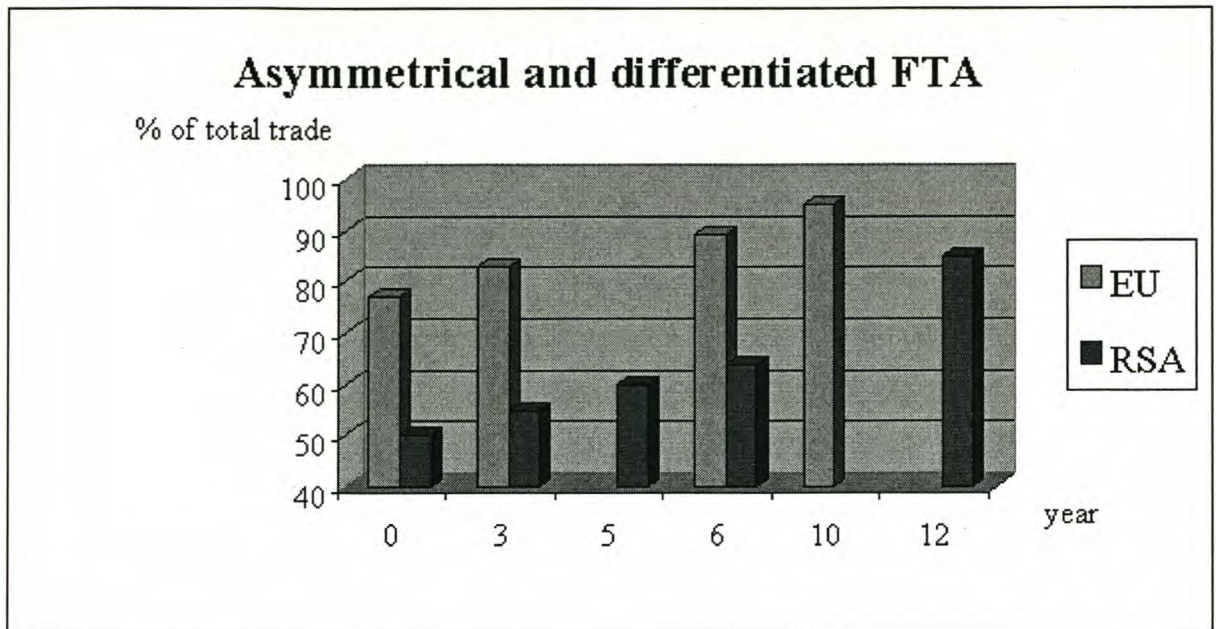
In addition to South Africa liberalising 86.5% of EU industrial imports and 81% of agricultural imports, 2.9% will be partially liberalised. On the EU side an additional 13% of agricultural imports will be liberalised partially, 61.4% of agricultural imports and 99, 98% of industrial imports being subject to full liberalisation. The parties have agreed that these exemptions will be reviewed during the course of the Agreement.<sup>227</sup>

<sup>225</sup> See Chapter 2.4; A Free Trade Area can be defined as a group of two or more countries that have eliminated tariff and all or most non-tariff measures affecting trade among themselves.

<sup>226</sup> Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 26; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 4; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>227</sup> EU COMTDCA *between the EU and RSA* (1999) 5; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); Bertelsmann - Scott "The EU, SA and the FTA" *SAYII* (2000) 114; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 4; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001); DTI *TDCA* (1999) 3; Van Heerden *Implications for South African Business* in: Bertelsmann-Scott, Mills, Sidiropoulos (ed) *The EU-SA Agreement: South Africa, Southern Africa and the European Union* (2000) 97; Lowe *Main Parameters of the EU – SA Partnership* in: Bertelsmann-Scott, Mills, Sidiropoulos (ed) *The EU-SA Agreement: South Africa, Southern Africa and the European Union* (2000) 41; see Appendix 4; Percentages are based on value of 1994-1996 average trade, the period before the start of the mutual





- Protection for sensitive sectors

During the TDCA negotiations both the EU and South Africa have sought to protect those sectors which are considered vulnerable to the introduction of free trade.<sup>228</sup>

In the case of the EU this has resulted in the exclusion of a large range of agricultural products from the tariff reduction commitments or the negotiation of tariff quota restrictions. In the case of South Africa this has resulted in the deferment of tariff elimination commitments in the vehicle and motor component sectors, which constitutes the largest single component of South Africa's manufacturing sector.<sup>229</sup>

To a certain extent South Africa has also sought to either exclude regionally sensitive products from tariff elimination commitments or "backload" these commitments.<sup>230</sup>

This is of special interest for Botswana, Namibia, Lesotho and Swaziland, all of which

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tariff elimination. They therefore do not illustrate the growth potential of current non-traded goods that will generally be subject to free trade upon enforcement of the Agreement.

<sup>228</sup> See Appendix 5 and for the negotiating process, see Chapter 2; EU COM *Partners in Progress* (1999) 8; Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 114; Davies *Forging a new relationship with the EU* (2000) 10; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); EU COM *TDCA between the EU and RSA* (1999) 40.

<sup>229</sup> Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 48.

<sup>230</sup> Backloading means that tariffs are only eliminated towards the end of the transition period.



are in the Southern African Customs Union (SACU) with South Africa. South Africa's membership of the SACU means that all duty reductions agreed upon in a FTA between the EU and South Africa also apply to Botswana, Lesotho, Namibia and Swaziland. This is so because the SACU agreement provides for South African law and customs regulations to be the pivot around which the SACU operates, and for the members of the SACU to implement the South African tariff as a common external tariff.<sup>231</sup> Furthermore, in Article 3 of the SACU agreement the Member States agreed not to impose any duties on goods which had been imported from outside the common customs area, when re-exported to another Member State. This would face companies in the BLNS countries with increased competition for some of their product lines.<sup>232</sup> Therefore, in order to address BLNS concerns, certain products of specific interest to the BLNS countries have also been excluded from the agreement.<sup>233</sup>

- Support for regional integration

Although the principle of asymmetry means that the weaker partner, in this case South Africa, will have more time to implement less onerous obligations than the stronger partner, the reciprocal obligations imposed on South Africa under the FTA will require the duty-free admission of a range of industrial and agricultural EU products. The FTA will necessarily result in greater competition. Products from the BLNS states will have to compete with European agricultural and manufactured products, which, once liberalised, will arrive duty-free in the SACU area and consequently cost substantially less than before. Certain sectors of their economies are therefore likely to suffer from adjustment costs, especially if one considers the generally superior standard of quality of European products.<sup>234</sup> The BLNS is

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<sup>231</sup> Blumberg/Wentzel "Trade relations with Southern Africa" *DBSA Paper No 29* (1994) 2.

<sup>232</sup> According to Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 21* (1999) 49, these are the following products: Meat products (Namibia, Botswana and Swaziland), Dairy products (Namibia), Flour (Namibia and Botswana), Flour-based products (Namibia, Botswana), Beer (Namibia), Confectionery (Swaziland), Sugar-based pre-mixes (Swaziland), Canned fruit and jam (Swaziland), Asparagus (Lesotho), Glacé cherries (Swaziland), Polyester material (Botswana) Bath towels (Botswana) Umbrellas (Lesotho), Glass fibre pipes (Botswana), Cars (Botswana), Refrigeration equipment (Swaziland), Televisions (Lesotho).

<sup>233</sup> Compare Appendix 5; EU COM *Partners in Progress* (1999) 9.

<sup>234</sup> Davies *Forging a new relationship with the EU* (2000) 10-11.



especially worried about the system of producer and export subsidies that the EU upholds for a great part of its agricultural products.<sup>235</sup>

The problems that could occur are perhaps best illustrated through the experience of the Namibian beef sector, a sector which, like sugar in Swaziland, forms the backbone of the national economy. In the case of Namibia, the opportunities for the development of commercial cattle production in the northern communal areas (where half the Namibian population live) were undermined by a dramatic increase in highly subsidised EU beef exports to South Africa. This increase in subsidised EU beef exports occurred in direct response to the lifting of quantitative controls on imports into South Africa, and increases in the level of export refunds paid by the EU on beef exports to South Africa. These increased export refunds allowed EU exporters to vault the remaining barrier of protective tariffs, with EU beef exports accounting for 10% of the overall South African beef market and up to 70% of certain components of the Namibian market. The economic impact of the EU beef exports exceeded R 600 million in losses for the South African cattle-raising sector.<sup>236</sup>

For this reason, the EU and South Africa have committed themselves to designing the FTA in a way which will support the process of regional economic integration currently under way in the Southern African region.<sup>237</sup> South Africa did not succeed in eliminating EU export subsidies completely, but there are some important breakthroughs. Firstly, the EU has committed itself not to pay export refunds on cheese exported to SA under the tariff quota of 5000 ton. Secondly, the EU is willing to eliminate export refunds on products South Africa might want to offer for front-loading during the implementation period.<sup>238</sup> Refunds will be eliminated in full once tariff liberalisation starts.<sup>239</sup> This is an important aspect of the agreement, as most of

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<sup>235</sup> The system of EU producer and export subsidies/refunds means that producers and exporters in the EU receive money from the budget of the EU, in order to offer their products on the domestic and the foreign market at lower prices on the world market. This gives them an advantage over the producers and exporters of other countries. Graumanns "Redefining relations between SA and the EU" *FDG Occasional Paper No 10* (1997) 25.

<sup>236</sup> Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 60.

<sup>237</sup> EU COM *Partners in Progress* (1999) 8.

<sup>238</sup> Front-loading means that tariffs would begin to be phased down at the beginning of the implementation period.

<sup>239</sup> DTI *TDCA* (1999) 5; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 6; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).



the EU agricultural products will not be competitive on the domestic market without refunds. Should the EU be unwilling or unable to eliminate export refunds, South Africa can simply retract its offer of front-loading. Furthermore, a number of sensitive products like beef and sugar are excluded from the free trade area and the EU has committed itself to provide funds to compensate the member countries of SACU for the adjustment costs that they might suffer as a result of the agreement.<sup>240</sup>

### 3.1.2.2 Industrial Sector

Under the agreement, traded goods are divided into industrial and agricultural products. The industrial sector accounts for around 86% of total South African exports to the EU.<sup>241</sup> While the EU's average tariff levels for industrial products is low, the removal of tariffs will nevertheless give South Africa's exporters a relative advantage over some of their competitors (non-EU Member States)<sup>242</sup> in the EU market. The EU will eliminate its industrial tariffs, either immediately, or within three years after the entry into force of the agreement. This includes most of the sensitive products relating to textiles and clothing (only about 20% of South Africa's textile exports to the EU will be phased out over a longer period).<sup>243</sup> According to Article 11 TDCA, tariffs on auto components were reduced to 50% of the MFN rates applied by the EU at enforcement of the agreement.<sup>244</sup> Other products, like ferro-chromium, with tariff-elimination starting in the 4<sup>th</sup> year, will continue to have a global duty-free quota. Only six lines of aluminium will remain on the reserve list. The products on the reserve list will nevertheless be subject to reviews.<sup>245</sup>

<sup>240</sup> EU COM *Partners in Progress* (1999) 30; See Appendix 5 for the list of excluded products; Bertelsmann-Scott "The EU, SA and the FTA" SAYIA (1999) 114.

<sup>241</sup> Bertelsmann-Scott "The EU, SA and the FTA" SAYIA (1999) 114; Van Heerden *Implications for South Africa* (2000) 97; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 5; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

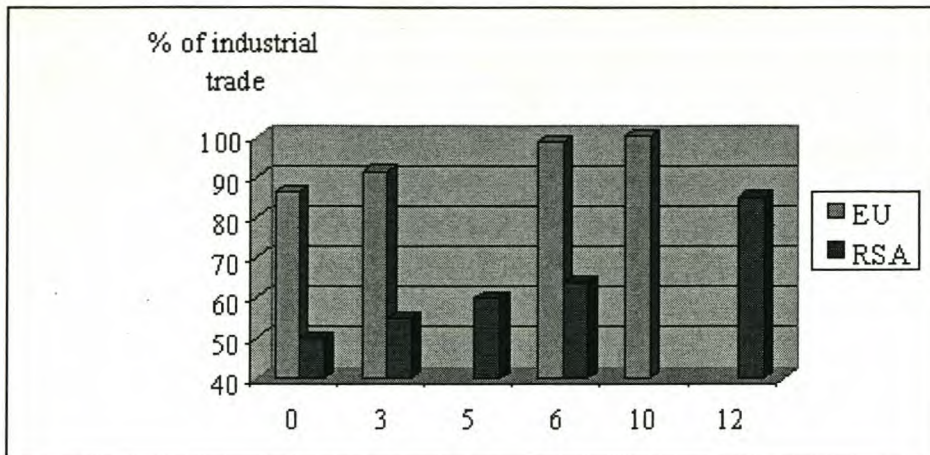
<sup>242</sup> According to Stevens & Kennan *Trade between South Africa and Europe* (1995) 15, "competitors" are defined as non-EU Member States.

<sup>243</sup> DTI *TDCA* (1999) 3; see Appendix 6; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 5; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>244</sup> The MFN rate is the rate applicable to all other contracting parties of the WTO. It prevents discrimination.

<sup>245</sup> DTI *TDCA* (1999) 4; EU COM *Partners in Progress* (1999) 9; Pallangyo *The impact of the EU – SA Agreement on SADC* in: Bertelsmann-Scott, Mills, Sidiropoulos (ed) *The EU-SA Agreement: South*





As indicated, the transitional period for the phasing out of tariffs by South Africa is twelve years, to allow for adjustment by companies.<sup>246</sup> Sensitive products, like automobiles and parts, will remain on the reserve list without any tariff elimination or reduction schedules at this point.<sup>247</sup> This will be reviewed in the light of the outcome of the mid-term review of the Motor Industry Development Programme.<sup>248</sup>

With regard to other sensitive products, South Africa persuaded the EU to moderate its initial expectations.<sup>249</sup> This will enable South Africa to have a longer time period for the phasing out of tariffs. In the case of clothing and textiles, there is a commitment to reduce the tariffs applicable to imports from the EU according to Article 12 TDCA. Depending on the segment of the market, the tariffs will vary between 5% and 20%

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*Africa, Southern Africa and the European Union* (2000) 73-74; Davies *Forging a new relationship with the EU* (2000) 10; see Appendix 5.

<sup>246</sup> See Chapter 3.1.2.1; EU COM *TDCA between the EU and RSA* (1999) 5; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 114.

<sup>247</sup> See Appendix 5; EU COM *Partners in Progress* (1999) 9; Davies *Forging a new relationship with the EU* (2000) 10; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 5; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>248</sup> DTI *TDCA* (1999) 4; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 5; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>249</sup> Obeng & Mc Gowan "EU-SA Free Trade Arrangements" *South African Journal of International Affairs* (1999) 103; Lowe *Main Parameters* (2000) 41.



by the end of the 8<sup>th</sup> year. Between the 8<sup>th</sup> year and the end of the transition period, EU products will enjoy a preference over the MFN rate of approximately 40%.<sup>250</sup>

The Agreement therefore takes into account the changes in these industries as a result of competition with European producers.

### 3.1.2.3 Agricultural sector

The agricultural sector has been a very contentious issue right from the beginning of the negotiations. Obviously, South Africa pushed for improved market access in order to be able to better exploit its comparative advantages in this field of economy. Given the labour intensiveness and growth potential of the South African farming sector, as well as the large consumer market within the EU, with more than 370 million inhabitants, a better share could result in some relief for South Africa's labour market. Nevertheless, the EU faces a strong farming lobby and, so far, has effectively protected the sector with its Common Agricultural Policy (CAP).

According to Article 33 ECT, the CAP was originally introduced to promote productivity, to promote a reasonable degree of self-sufficiency within the Community, to stabilize markets, to assure the availability of supplies and to ensure that supplies reach consumers at reasonable prices. This should be achieved by a structural policy directed towards increasing productivity, rather than by measures of market policy.

In practice, Community institutions found it to be virtually impossible to stabilize markets at a world market price level because this would have led to a considerable decrease of earnings in less efficient undertakings of certain Member States. Therefore the CAP concept of Community preference was introduced. It provides for an "intervention" or support price at which the Community guarantees to purchase the agricultural output from farmers, and a "threshold price" (that is higher than the internal support price) below which no imports are allowed. In order to isolate the EU market from international competition a "variable levy" equal to the margin between

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<sup>250</sup> EU COM *TDCA between the EU and RSA* (1999), 7-8; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); EU COM *Partners in Progress* (1999) 10; see Appendix 6; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 5; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).



the threshold price and the lowest representative offer price on world markets is imposed on imports. Moreover, an "export restitution" amounting to the difference between the average world price and the internal EU price is granted to European exporters.<sup>251</sup>

Taking into consideration the EU's CAP concept of Community Preference and the fact that the agricultural sector has generally been excluded by the EU in other free trade agreements, it is a unique event that South Africa achieved a number of concessions from the EU in this field.<sup>252</sup>

### 3.1.2.3.1 Liberalisation of agricultural imports

Though the EU excluded about 46% of agricultural imports from the FTA with South Africa in its negotiating mandate, it has finally agreed to liberalise 61.4% of agricultural imports from South Africa.<sup>253</sup> In addition, it granted South Africa tariff quotas for certain agricultural products at preferential tariff rates - ranging from zero to 50% of the MFN-rates in terms of Article 14 TDCA. As indicated above, these quotas make up 13% of agricultural trade with the EU.<sup>254</sup> South Africa for its part agreed to liberalise 81% of agricultural imports from the EU.<sup>255</sup> According to Article 15 TDCA certain sensitive products - sensitive also in a regional context - were placed on a review list, liberalisation of which would be considered at a later stage.

<sup>251</sup> Hoekman / Kostecki *The Political Economy of the World Trading System* (1995) 197.

<sup>252</sup> Bertelsmann-Scott "The EU, SA and the FTA" SAYII (2000) 115; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 5; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

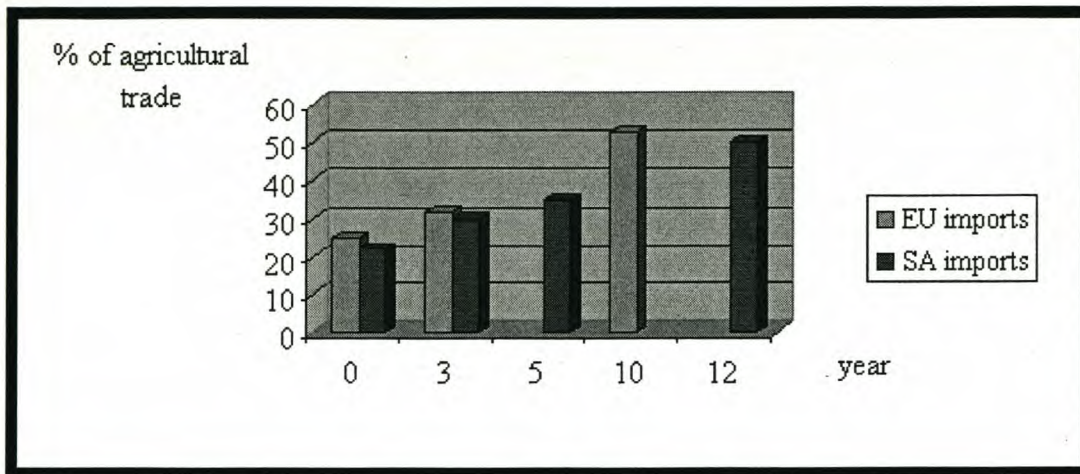
<sup>253</sup> See Appendix 4 for the coverage of the FTA and appendix 5 for the main products excluded at EU and SA side. For a detailed list of the liberalised products, see EU COM *TDCA between the EU and RSA* (1999) 8-11 and at [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 6; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>254</sup> EU COM *TDCA between the EU and RSA* (1999), 8; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); [www.eusa.org.za/EU-SA Trade&Economic CoopFree Trade Agreement.htm](http://www.eusa.org.za/EU-SA%20Trade&Economic%20Coop%20Free%20Trade%20Agreement.htm), 6 (14.08.2000); Bertelsmann-Scott "The EU, SA and the FTA" SAYII (2000) 115; EU COM *Partners in Progress* (1999) 10; Links *Negotiating a long-term relationship* in: Bertelsmann-Scott, Mills, Sidiropoulos (ed) *The EU-SA Agreement: South Africa, Southern Africa and the European Union* (2000) 34; Van Heerden *Implications for South Africa* 97.

<sup>255</sup> See Appendix 4 for the coverage of the FTA and appendix 5 for the main products excluded at EU and SA side. See for a detailed list of the liberalised products EU COM *TDCA between the EU and RSA* (1999) 8-11 and at [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001).



South Africa will therefore be pressing continuously for a review of this list in the light of changing circumstances on the EU and world markets.<sup>256</sup>



### 3.1.2.3.2 Agricultural safeguard clause

While the EU's CAP is still a matter of concern, the agreement (with regard to agricultural policies) provides for consultation and compensatory adjustments for any changes which may affect the balance of concessions.<sup>257</sup> According to Articles 16 and 24 TDCA the agricultural policies provision is supplemented by an Agricultural safeguard clause. This clause seeks to deal more expeditiously with the particular problems that can arise in the agricultural sector. It stipulates that, should there be proof that increased imports of agricultural products originating in one party are causing harm or threatening to cause harm to the markets of the other party, the Cooperation Council shall immediately consider the matter to find an appropriate solution.<sup>258</sup> Furthermore it gives the affected party the right to take provisional

<sup>256</sup> EU COM *TDCA between the EU and RSA* (1999) 10-11; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); DTI *TDCA* (1999) 5; See Appendix 4 and 5.

<sup>257</sup> DTI *TDCA* (1999) 4; Congress of South African Trade Union (COSATU) *Shaping South Africa's Future Trade Relations with the European Union: COSATU'S Concerns* in: Bertelsmann-Scott, Mills, Sidiropoulos (ed) *The EU-SA Agreement: South Africa, Southern Africa and the European Union* (2000) 122; Trade & Industry and Foreign Affairs Portfolio Committees, *Economic Affairs Select Committee SA-EU Trade, Development and Cooperation Agreement* (1999) 6; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>258</sup> According to Article 97 TDCA the Cooperation Council is the institution, which will ensure the functioning and the implementation of the Agreement and the dialogue between the parties. For



measures necessary to limit or redress the disturbance if a decision of the Cooperation Council is pending and where exceptional circumstances require immediate action. However, it stipulates that in taking such provisional measures, the affected party has to take into account the interests of both parties.<sup>259</sup>

Thus the agricultural safeguard clause gives South Africa the right to challenge the EU should there be the proof that increased imports from the EU are threatening the South African domestic market. However, at present it is unclear how the Cooperation Council will function and if the Cooperation Council will take SACU interests into consideration. Opening up the Cooperation Council to BLNS participation would appear to be wholly consistent with the general positions of principle expressed by both South Africa and the EU.

### 3.1.3 Trade related issues

In addition to tariff dismantling, the TDCA also covers a wide variety of trade related issues. During the negotiations, South Africa took the view that provisions on trade-related issues in the bilateral agreement with the EU should not go beyond the current multilateral conventions agreed on in bodies like the WTO or the World Intellectual Property Rights Organisation.<sup>260</sup> However, the WTO and World Intellectual Property Rights Organisation have not as yet reached worldwide agreement on some of the issues that the EU proposed for inclusion in the TDCA. Pretoria managed to avoid making any commitments ahead of global agreement, and committed itself only to a number of minor concessions that were essential to the proper functioning of the trade agreement.<sup>261</sup>

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further responsibilities of the Cooperation Council, see EU COM *TDCA between the EU and RSA* (1999) 35; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001)

<sup>259</sup> EU COM *TDCA between the EU and RSA* (1999) 11 and 13; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); DTI *TDCA* (1999) 4; 115; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 6; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>260</sup> DTI *TDCA* (1999) 5; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 6; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>261</sup> Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 115.



### 3.1.3.1 Customs Unions and FTAs

Future Customs Unions or FTAs that either party should enter into could have adverse effects on the SA-EU FTA.<sup>262</sup> For this scenario Article 22 (2) TDCA accordingly provides for consultation between the two parties on the effects that domestic interests might suffer. Whether this consultation within the Cooperation Council is enough to ensure that account can be taken of the mutual interests of the Community and South Africa will soon be tested, as the EU is preparing for expansion towards Eastern Europe and South Africa is concluding an FTA with its neighbours in Southern Africa.<sup>263</sup>

### 3.1.3.2 Antidumping and Countervailing measures

Article 23 TDCA states that both parties may use antidumping duties and countervailing measures in accordance with GATT rules.<sup>264</sup>

The meaning of dumping signifies the sale of products for export at a price below home market price. WTO contracting parties are allowed to unilaterally utilize antidumping duties to offset the margin of dumping of dumped goods, provided that it can be shown that such dumping by a company causes harm or threatens to cause "material injury" to competing domestic industries. The overall approach is that the importing country must show a harmful impact on the total industry producing the "like product" in the importing country. If injury is established, the importing country may charge extra import duty on the particular product in order to bring it to the "normal value" or to remove the injury to its domestic industry.<sup>265</sup>

With regard to the present case, the matter has a specific impact on the EU-SA trade regime. Allowing a unilateral response to dumping in the context of trade relations between large and small economies tends to give an advantage to the former.<sup>266</sup> In the situation between the EU and South Africa, the EU accounts for almost 40% of

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<sup>262</sup> Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 115.

<sup>263</sup> DTI *TDCA* (1999) 5; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 7; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>264</sup> EU COM *Partners in Progress* (1999) 20; EU COM *TDCA between the EU and RSA* (1999) 13; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001).

<sup>265</sup> Article VI GATT 1994: "less than normal value" as quoted by Jackson *The World Trading System* (1998) 256 and 408.

<sup>266</sup> Jackson *The World Trading System* (1998) 273.



South Africa's exports, whereas South Africa is the destination for only 1.3% of the Community's exports.<sup>267</sup> Thus, the EU can more easily apply antidumping duties to South African products without the worry of retaliation or symmetrical application by its counterpart. Any application of duties from the South African side would only have a very small effect on the European economy.<sup>268</sup>

In view of this effect, the general prohibition appears to have been more beneficial for South Africa. However, with regard to South Africa as the smaller economy, the EU has not granted immunity to South Africa in this issue. Instead, the contracting parties constituted in Article 23 (1) TDCA that "nothing in this Agreement" shall prevent either Party from taking antidumping or countervailing measures in accordance with GATT provisions. Nevertheless, Article 23 (2) TDCA also provides for the parties to consider alternatives before imposing definitive antidumping and countervailing measures. Consequently, there remains an important margin for the relevant firms to put options for undertaking on price, volume and/or a combination of these, rather than to face prohibitive duties.<sup>269</sup>

### 3.1.3.3 Safeguard measures

In order to protect infant industries<sup>270</sup> in both South Africa and the SACU countries, South Africa insisted on comprehensive provisions covering regular, regional and transitional (measures of limited duration) safeguard measures.<sup>271</sup> According to Articles 24 and 26 TDCA, the regular safeguard provides for measures to be taken in

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<sup>267</sup> EU COM *Partners in Progress* (1999) 7.

<sup>268</sup> Compare the example USA-Canada by Jackson *The World Trading System* (1998) 273.

<sup>269</sup> DTI *TDCA* (1999) 5.

<sup>270</sup> The "infant industry" argument is a commonly stated "exception" to liberal trade theory. This argument proposes the use of import barriers to enable a new or young industry to become established and viable. The barriers to imports give some shelter against foreign competition, until the industry is strong enough to meet that competition. However, there are several problems with this argument. The main problem is the problem of identifying which industries should receive the benefit of "infant" treatment and there is often a tendency to argue for perpetual infancy status. For further discussion, see Jackson *The World Trading System* (1998) 24.

<sup>271</sup> Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 115; EU COM *Partners in Progress* (1999) 18; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 7; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).



the case of import surges, which threaten or cause injury to domestic producers.<sup>272</sup> In addition, only South Africa will be entitled by Article 24 (3) TDCA to take exceptional measures to protect infant industries or sectors if any product is being imported in such quantities and under such conditions as to cause or threaten to cause serious deterioration in the economic situation of a Member State of the SACU. However, South Africa is obliged to examine alternative solutions before taking safeguard measures. Furthermore Article 25 TDCA stipulates that exceptional measures of limited duration (transitional safeguard measures) may be taken by South Africa in the form of an increase or reintroduction of customs duties concerning infant industries or sectors facing serious difficulties caused by increased imports originating in the European Community as a result of the reduction of duties envisaged by the agreement.<sup>273</sup>

The comprehensive safeguard provision is important to ensure that South Africa and other SACU members can temporarily protect themselves or slow down the pace of liberalisation if the impact proves to be more than South Africa or the respective SACU members can handle.<sup>274</sup> However, it is unclear at present how the Cooperation Council will handle the cooperation between the two parties. Since the EU-SA TDCA will apply to the whole territory of SACU, and not simply to South Africa, there is a strong case for the BLNS government to be represented in the Cooperation Council.<sup>275</sup>

#### 3.1.3.4 Used goods

Trade in used goods is of great importance in the EU and in South Africa. Especially in South Africa, where 13% of the population (about 5.4 million people) live under "first world" conditions and 53% of the population (about 22 million people), at the

<sup>272</sup> DTI *TDCA* (1999) 6; EU COM *TDCA between the EU and RSA* (1999) 13-14; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001).

<sup>273</sup> Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 116; EU COM *Partners in Progress* (1999) 19; COSATU *Shaping SA's future trade relations* (2000) 122; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 7; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>274</sup> Links *Long-term relationship* (2000) 35; Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 116; EU COM *Partners in Progress* (1999) 19; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 7; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>275</sup> See Chapter 3.1.2.3.2.



other extreme, live under "third world" conditions, many people are in need of affordable used goods.<sup>276</sup> Goods such as automobiles and textiles, for example, are repeatedly traded by second-hand dealers and private persons over a long period of time, after once having been sold as new products. The trade in used goods could therefore provide many trading opportunities for the domestic market and has great importance for traders and consumers. With regard to consumers, used goods such as cars, due to their age, often are in a condition that is not as good and safe as new products. They therefore constitute a danger with regard to the environment as well as the health and safety of the consumer.

The TDCA had to give consideration to the importance of trade in used goods, to avoid disruption of this market through the importation of used goods, and to protect consumers. The exception clause in Article 27 TDCA provides for the protection of domestic producers and consumers with regard to the importation of used goods through the restriction of trade in used goods.<sup>277</sup> Such restrictions, however, do not constitute a means of arbitrary or unjustifiable discrimination where the same conditions or a disguised restriction on trade between the parties prevail.

### **3.1.3.5 Competition Policy**

Most industrialized countries have introduced competition rules into their national legislation in order to avoid restrictive agreements and business practices and to prevent large enterprises abusing their economic dominance. Such practices are not of national concern only, but can also defeat the underlying purposes of the world trading system. Nevertheless, there is no international agreement so far on competition policy within the context of the WTO.<sup>278</sup> South Africa and the EU, however, managed to agree bilaterally on certain competition rules in order to prevent abuses by companies enjoying dominant market positions in either the EU or South Africa. This is meant to ensure free and fair competition between companies in both the EU and South Africa.

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<sup>276</sup> Compare Chapter 2.2.4.1.

<sup>277</sup> Interview with Philip Snyman, Acting Director: Import and Export Control at the DTI of the RSA (07 June 2001): the extent to which the trade in used goods is restricted underlies an internal government document.

<sup>278</sup> The EU has general agreements with third countries in this area, e.g. with the USA.



Nevertheless, the EU and South Africa had different points of view on the competition policy. Whereas the EU had longstanding rules in this respect and pushed for competition rules that would meet European standards, South Africa sought to ensure that the provisions did not go beyond those of South Africa's new competition policy and law.<sup>279</sup>

The compromise that was reached (Articles 35-39 TDCA) provides for a transitional implementation period of three years. Furthermore, the definition of incompatible restrictive business practices is in line with the respective provisions in both the South African Competition Law and the EC Treaty.<sup>280</sup> According to Article 38 (4) TDCA there are provisions for consultation between the European Commission, which has the power to veto all mergers and acquisitions in the EU, and the South African competition authorities. Both sides have committed themselves to "considerations of comity" and to endeavour to find a mutually acceptable solution whenever an investigation or any other action with important implications for the interests of either party is intended or takes place. In addition, the EU has promised, in Article 39 TDCA, to provide South Africa with technical assistance including the exchange of experts, the organisation of seminars and training activities in the restructuring of its competition law and policy.<sup>281</sup>

### 3.1.3.6 Public Aid

The TDCA does not apply the rules on competition policy to private business only, but also to state aid. The reason for this is that public subsidies are considered to be fraught with potentially damaging effects on free competition on the common market.<sup>282</sup> Article 41 TDCA therefore stipulates that respective state measures are

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<sup>279</sup> See Competition Act No. 89 of 1998; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 7; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>280</sup> See Competition Act No. 89 of 1998 and the Articles 81 and 82 ECT; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 7; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001): The agreement reached, however, does not regulate the provision of state aid, nor deals with services and government procurement as was proposed by the EU.

<sup>281</sup> EU COM *Partners in Progress* (1999) 18; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); EU COM *TDCA between the EU and RSA* (1999) 18.

<sup>282</sup> See Article 87 (1) ECT.



prohibited under this particular article unless they “support a specific public policy objective of either Party.”

In practice South Africa’s specific transitional requirements and the enlargement of the EU to Eastern Europe might require extensive public aid in the future. Article 41 TDCA should stipulate which measures are prohibited, but in my view, the broad language of this provision will inevitably relate to disagreements concerning the determination of public policy objectives qualifying for an exception to the general prohibition of public support. To avoid such disagreements, the TDCA further stipulates that it is in both parties’ interest to ensure that public aid is granted in a fair and transparent manner.<sup>283</sup> The provision takes into account the facilitating role of state support and involvement in the restructuring of the South African industry and economy.<sup>284</sup> It thus provides for consultation between the parties to find “a mutually satisfactory solution” to situations where public aid distorts fair competition in terms of Article 42 TDCA.<sup>285</sup>

It is not clear what kind of “mutually satisfactory solution” is required, though. The bottom line seems to be the WTO law, because Article 44 TDCA specifically declares that the GATT/WTO Agreements “shall apply to public aid or subsidies”. Concerning the “fair and transparent manner”, the provision also does not provide any further definition. Thus, all in all, one has to admit that there is a lack of clear-cut arrangements, which makes the public aid section a very loose piece of legislation. The respective provisions therefore require the Cooperation Council to assign a particular meaning to issues on which the negotiators could not agree, thereby possibly postponing conflict to the future.

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<sup>283</sup> EU COM *Partners in Progress* (1999) 20; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); EU COM *TDCA between the EU and RSA* (1999) 19.

<sup>284</sup> Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 7; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>285</sup> DTI *TDCA* (1999) 6-7.



### 3.1.3.7 Dispute Settlement

The effective resolution of trade disputes is vital for the smooth functioning of the trading system. Unlike many other dispute settlement mechanisms in Public International Law, the WTO procedures are structured in clearly defined stages with a timetable to be followed and, if necessary, a compulsory panel ruling that can be appealed once. However, the WTO Dispute Settlement Bodies only have jurisdiction over disputes arising under an agreement covered by the WTO.<sup>286</sup> Free Trade Areas, by contrast, are trade regimes on their own.<sup>287</sup> It follows in the present case that the Dispute Settlement Bodies have no jurisdiction over disputes arising between South Africa and the EU concerning their respective rights and obligations under the TDCA.

Accordingly, Article 104 TDCA sets out clear rules for the trade chapter, in order to ensure that there are no unnecessary delays in the resolution of disputes. Article 104 TDCA stipulates that each party may refer to the Cooperation Council any dispute relating to the application or interpretation of the TDCA. The Cooperation Council may settle any dispute by means of a decision and each party shall be bound by this decision. In the case that the dispute can not be settled by a decision of the Cooperation Council, either party may notify the other of the appointment of an arbitrator. The other party must then appoint a second arbitrator within two months of the appointment of the first arbitrator. According to Article 104 (5) TDCA, the Cooperation Council then has to appoint a third arbitrator within six months, and in trade and trade-related issues within 60 days. The arbitrator's decision shall be taken by majority vote within twelve months. In trade and trade-related issues the arbitrators shall aim to issue their report to the parties within six months and, in urgent cases, including those involving perishable goods, within three months. Its majority ruling is binding.<sup>288</sup>

It appears that, in practice, the proceedings in the Cooperation Council are primarily focusing on consultation and mediation between the parties and will only lead to a decision if the Cooperation Council comes to a unanimous decision. Contentious cases will most likely be referred to the arbitration panel. The timetable under Article

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<sup>286</sup> Article 1 DSU; Hoekman/Kostecki *From GATT to WTO* (1995) 44-50.

<sup>287</sup> Hoekman/Kostecki *From GATT to WTO* (1995) 46.

<sup>288</sup> [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); EU COM TDCA *between the EU and RSA* (1999) 36-37.



104 TDCA is tight and will lead to the prompt settlement of conflicts. This is essential in trade relations and therefore an important feature of the TDCA.

### 3.1.4 Economic Cooperation

Under Title IV TDCA, the EU and South Africa agree to cooperate on a wide range of economic and industrial matters, to their mutual advantage and in the interest of the Southern African region as a whole.<sup>289</sup> This will focus on:

- Diversifying and strengthening their economic links;
- Promoting lasting development in both parties' economies;
- Supporting patterns of regional economic cooperation;
- Promoting economic cooperation between small and medium-sized enterprises; and
- Protecting and improving the environment.

Cooperation in the areas of industry, investment promotion, information and communication technology will be promoted by the Agreement.<sup>290</sup>

At this stage, however, it is too early to say how the cooperation in this area will work in detail. Since the TDCA is a "pilot project" for both the EU and South Africa, many of the agreed provisions in this area at this stage have to be regarded rather as an aim of the two parties than as a detailed obligation which will definitely be realized within a fixed period of time. But although this provision also expresses "only" an aim, it unilaterally takes the needs in South Africa and the Southern African region into consideration. In how far the economic cooperation in the various fields will be realized remains to be seen in the future.

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<sup>289</sup> EU COM *TDCA between the EU and RSA* (1999) 21-27; EU COM *Partners in Progress* (1999) 21-22; Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 116; Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 28.

<sup>290</sup> DTI *TDCA* (1999) 7; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 8; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).



### 3.1.4.1 Industry

According to Article 51 TDCA, the parties aimed to facilitate restructuring and modernization of South African industry while fostering its competitiveness and growth. The Agreement made provision for encouraging cooperation between European and South African economic operators (companies, professionals, organized labour etc.), stimulating and diversifying output for the domestic and export markets for and promoting the use of South Africa's human resources through facilitation of access to credit and investment finance and support to industrial innovation, technology transfer, training, research and technological development.<sup>291</sup> This aspect is especially important for South Africa, because the weaker party in an FTA predominantly gains more from the transfer of technology and development, and less from tariff liberalisation.<sup>292</sup>

### 3.1.4.2 Investment promotion and protection

Article 52 TDCA provides that both sides will aim to establish a climate which favours and promotes mutually beneficial investments, both domestic and foreign, especially through improved conditions for investment protection, investment promotion, the transfer of capital and the exchange of investment opportunities. The aim of cooperation shall be to facilitate and encourage the conclusion, where appropriate between the Member States and South Africa, of agreements for the promotion and protection of investments and to avoid double taxation. Furthermore, Article 52 TDCA states that the two parties shall exchange information on investment opportunities, work towards harmonised procedures and administrative practices in the field of investment and support the promotion and encouragement of investments in South Africa and the Southern African region.<sup>293</sup>

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<sup>291</sup> Compare the Science and Technology Agreement in Chapter 2.7; EU COM *TDCA between the EU and RSA* (1999) 22; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001).

<sup>292</sup> Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 116.

<sup>293</sup> EU COM *TDCA between the EU and RSA* (1999) 22; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); EU COM *Partners in Progress* (1999) 21.



### 3.1.4.3 Information society

The EU and South Africa will cooperate in the area of information and communication technology. According to Article 55 TDCA this will include support for the development of satellite technology in the Southern African region, a dialogue on different aspects of the information society, including regulatory aspects and communications policy, and the dissemination of new information and communication technologies. There are also provisions for the promotion and implementation of joint research in the information technology sector.<sup>294</sup>

### 3.1.4.4 Other aspects of economic cooperation

Furthermore the TDCA provides for economic cooperation in the fields of energy, mining, tourism, agriculture, fisheries, consumer policy and services, including financial services. In all those fields cooperation is to be aimed at the promotion of integrated and durable development in South Africa. Access of South Africans to affordable and reliable sources of the various fields and services is to be improved and cooperation between countries in the Southern African region to be supported.<sup>295</sup> How these aims will be realized in practice is also not laid down in the agreement between the EU and South Africa and remains to be seen in the future.

### 3.1.5 Development Cooperation

The Agreement had to acknowledge the difference between the two partners in terms of their respective levels of development, and the need for South Africa to undergo a series of structural reforms to make its economy more competitive. From the start the EU and South Africa were prepared to insert a strong developmental dimension into the Agreement. It found its way into the TDCA in Title V.<sup>296</sup>

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<sup>294</sup> EU COM *TDCA between the EU and RSA* (1999) 23-24; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); EU COM *Partners in Progress* (1999) 21.

<sup>295</sup> EU COM *TDCA between the EU and RSA* (1999) 21-27; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); EU COM *Partners in Progress* (1999) 22; DTI *TDCA* (1999) 7.

<sup>296</sup> Lowe *Main Parameters* (2000) 41.



### 3.1.5.1 General aims

Article 65 TDCA stipulates that development cooperation between the EU and South Africa shall be conducted in a context of policy dialogue and partnership, and shall support the policies and reforms carried out by the national authorities. In particular, it shall contribute to South Africa's economic development and to its insertion into the world economy and to consolidate the foundations laid for a democratic society. Within this context, priority shall be given to providing support to the adjustment efforts occasioned in the region by the establishment of the free trade area under the agreement and to operations that help the fight against poverty. In contrast to other areas of the agreement, Article 68 TDCA gives some means and methods for realizing the developmental concern. It stipulates that particular studies, technical assistance, supplies and works and also evaluation and monitoring of audits and missions shall support the development cooperation. Furthermore, Community financing may cover government budget expenditures to support reforms in South Africa, as well as investment and equipment.<sup>297</sup>

### 3.1.5.2 Differentiation and Asymmetry

The developmental concern further found its way into the trade part of the TDCA, through the twin concepts of differentiation and asymmetry.<sup>298</sup> As indicated, differentiation reflects the difference in the coverage of free trade between the two sides by the end of the transition period and asymmetry has to do with the timing of the tariff reduction schedules.<sup>299</sup> According to Articles 5-7 TDCA, South Africa will grant duty-free status to 86 % of its imports from the EU, whereas the EU will accept 95% of South African exports duty-free and tariff cuts will take place much earlier on the EU side than on the South African side.<sup>300</sup>

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<sup>297</sup> EU COM *TDCA between the EU and RSA* (1999) 21-27; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001).

<sup>298</sup> Lowe *Main Parameters* (2000) 41.

<sup>299</sup> For further explanation, see Chapter 2.1.2.

<sup>300</sup> EU COM *TDCA between the EU and RSA* (1999) 5; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); Lowe *Main Parameters* (2000) 41.



### 3.1.5.3 The European Programme for Reconstruction and Development

Furthermore, the aim of development cooperation shall be realized through continued financial assistance for development activities at a substantial level for the duration of the Agreement. As the Agreement is open-ended in character, this paves the way for long-term development cooperation between the two sides.<sup>301</sup>

The EU currently implements a large-scale development programme in South Africa under the EPRD. As indicated above, the programme, with an average annual budget of 127.5 million €, is the largest single development programme in South Africa and one of the biggest implemented by the EU in any part of the world.<sup>302</sup> Further development assistance is provided through the multi-annual loan programme for South Africa (currently at about 150 million € a year), which is managed by the EIB.<sup>303</sup> The aim of the EPRD is to assist the Government of South Africa in tackling the wide range of socio-economic problems resulting from the apartheid era. EPRD projects are thus designed in close cooperation with the South African Government and the implementation of each project shall be carried out hand-in-hand with the relevant authorities.<sup>304</sup>

According to Article 66 TDCA and Article 2 of the Council Regulation 2259 / 96 the axes of the EPRD approach 1995-1999 were the following:<sup>305</sup>

#### 3.1.5.3.1 Basic social services

The main objective was to improve the standard of living of the poor in historically disadvantaged communities. Particular emphasis was placed on primary basic and adult education and training, primary health care, HIV/AIDS and reproductive health, water and sanitation and housing.

<sup>301</sup> EU COM *Partners in Progress* (1999) 14.

<sup>302</sup> See Chapter 2.6 and Appendix 2 and Appendix 3; EU Council *Verordnung Nr. 2259/96* (1996) 1; Lowe *Main Parameters* (2000) 41; EU COM *Partners in Progress* (1999) 14.

<sup>303</sup> EU COM *Partners in Progress* (1999) 14; Lowe *Main Parameters* (2000) 42.

<sup>304</sup> EU COM *Partners in Progress* (1999) 14; EU COM *Europäisches Programm für Wiederaufbau und Entwicklung in Südafrika (Ratsverordnung 2259/96) Jahresbericht 1998* (2000) 3.

<sup>305</sup> EU COM *TDCA between the EU and RSA* (1999) 27-28; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); EU COM *EPWE Jahresbericht 1998* (2000) 3; For the following points, see Appendix 2 and Appendix 3.



#### **3.1.5.3.2 Private Sector Development**

Support was mainly targeted at private enterprises and addressed the gender issue by giving particular attention to the needs of women, who play a key role in many of the informal business activities. Attention was also given to financial intermediaries such as banks and Non-Governmental-Organisations (NGOs) by encouraging them to offer their services to the disadvantaged population.

#### **3.1.5.3.3 Good governance, democratisation and human rights**

Assistance in this area focused on restructuring and reorienting the public services and on capacity-building in national and provincial departments, local governments and professional associations. Cooperation also aimed at attaining a qualitative change in legal practice (restructuring of the judiciary system, training of judges), so that confidence in the legal system could prevail.

#### **3.1.5.3.4 Regional cooperation**

The main objective was to incorporate South Africa within the regional programmes of the Community being implemented through the SADC. These support programmes of the Community for the SADC included infrastructure and services, food, agriculture and finance, as well as trade and investment.

#### **3.1.6 Cooperation in social, cultural and other areas**

Although the emphasis of the Agreement lies in the fields of trade and economic and financial cooperation between the EU and South Africa, Title VI TDCA further covers cooperation in the fields of the environment, cultural contacts, information and the



media, as well as social cooperation, human resource development, health, data protection and the fight against drugs and money laundering.<sup>306</sup>

Concerning social cooperation, the EU and South Africa will - according to Article 86 (1) TDCA - engage in a dialogue which will include questions relating to the social problems of post-apartheid society, poverty alleviation, unemployment, gender equality, violations against women, children's rights, labour relations, public health, safety at work and population.<sup>307</sup>

According to Article 86 (2) TDCA, the parties recognise their responsibility with regard to children's rights, labour relations, public health, safety at work and ability to guarantee basic social rights, which specifically aim at the freedom of association of workers, the right to collective bargaining, the abolition of forced labour, the elimination of discrimination in respect of employment and occupation and the effective abolition of child labour. The EU and South Africa confirm that pertinent standards of the International Labour Organisation (ILO) will be the point of reference for the development of these rights.<sup>308</sup>

Cooperation in the area of Science and Technology is covered by the Science and Technology Agreement signed between the EU and South Africa in December 1996.<sup>309</sup>

### 3.1.7 Institutional provisions

The institutional provisions of the TDCA (Article 97) provide for the establishment of the Cooperation Council to ensure that the Agreement operates effectively and that the objectives of the Agreement are pursued in the best possible way.<sup>310</sup> The Agreement will also facilitate regular contact between the Parliaments of both sides,

<sup>306</sup> EU COM *TDCA between the EU and RSA* (1999) 31-34; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); [www.eusa.org.za/EU-SA Trade&Economic Coop/Free Trade Agreement.htm](http://www.eusa.org.za/EU-SA%20Trade&Economic%20Coop/Free%20Trade%20Agreement.htm), 6 (14.08.2000).

<sup>307</sup> [www.europa.eu.int/eur-lex/de/lif/dat/1999/de\\_299A\\_1204\\_02.htm](http://www.europa.eu.int/eur-lex/de/lif/dat/1999/de_299A_1204_02.htm) (29.05.2000), 32; EU COM *Partners in Progress* (1999) 23.

<sup>308</sup> EU COM *Partners in Progress* (1999) 23; the ILO sets the international standards under which people should work. It deals with issues such as labour relations, public health, safety at work and ability to guarantee basic social rights, which specifically aim at the freedom of association of workers, the right to collective bargaining, the abolition of forced labour, the elimination of discrimination in respect of employment and occupation and the effective abolition of child labour.

<sup>309</sup> See Chapter 2.7.

<sup>310</sup> For the task of the Cooperation Council, see Chapter 3.1.3.7.



as well as between the Economic and Social Committee of the European Community (ECOSOC) and the South African counterpart, the National Economic Development and Labour Council (NEDLAC). These contacts will provide a forum for various areas of dialogue and cooperation covered by the Agreement.<sup>311</sup>

### 3.1.8 Protocol on the Rules of Origin

The EU-SA TDCA, like any preferential trade arrangement, contains detailed rules of origin, in Protocol 1. These rules prevent the deflection of trade and thereby protect the integrity of the Agreement.<sup>312</sup> It prescribes what would count as local content and therefore has the same function as a “passport” for a person.<sup>313</sup> The application of the rules of origin will ensure that trade preferences included in the deal are only applied to European and South African products and it will therefore determine to what extent economic operators will be able to make use of the tariff preferences in the Agreement.<sup>314</sup>

#### 3.1.8.1 South African or EU origin

In order to determine which products can be considered as originating either in the EU, or South Africa, Protocol 1, Articles 4 and 5 TDCA firstly provide that products are defined as of South African or EU origin when they are “wholly obtained” in either the EU or South Africa. Examples in Protocol 1, Article 4 (1) a) TDCA include

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<sup>311</sup> [www.eusa.org.za/EU-SA Trade&Economic Coop/Free Trade Agreement.htm](http://www.eusa.org.za/EU-SA%20Trade&Economic%20Coop/Free%20Trade%20Agreement.htm), 6 -7 (14.08.2000); EU COM *TDCA between the EU and RSA* (1999) 35; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); [www.europa.eu.int/eur-lex/de/lif/dat/1999/de\\_299A\\_1204\\_02.htm](http://www.europa.eu.int/eur-lex/de/lif/dat/1999/de_299A_1204_02.htm) (29.05.2000); Smalberger *Lessons learnt by South Africa during the negotiations in: Bertelsmann-Scott, Mills, Sidiropoulos (ed) The EU-SA Agreement: South Africa, Southern Africa and the European Union* (2000) 50.

<sup>312</sup> DTI *TDCA* (1999) 7; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 8; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>313</sup> EU COM *Partners in Progress* (1999) 11; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 8; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>314</sup> EU COM *Partners in Progress* (1999) 11; Smalberger *Lessons learnt by SA* (2000) 50; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 8; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).



agricultural products or products from the sea that originate in either of the two regions or waters.<sup>315</sup>

Secondly, products are considered as originating in the EU or South Africa when they are not “wholly obtained”, but have been “sufficiently worked or processed”. To be “sufficiently worked or processed” according to Protocol 1, Article 5 TDCA, the materials used must undergo a “change of tariff heading (CTH)” or “sufficient value” must be added to the product in the EU or South Africa.<sup>316</sup> A CTH criterion is equivalent in effect to the value-added criterion, as CTH will require adding value through processing of a product. The difference is that under a CTH the value added may be high or low for a given product. Conversely, a value-added criterion may or may not lead to the same result as a CTH test.<sup>317</sup> A general problem with the rules of origin is therefore that there can be wide variance in their economic effects. In order to avoid this, the agreement, in Protocol 1, Article 6 TDCA, provides certain criteria for determining whether a product has been “sufficiently worked or processed”. These criteria refer to the use of specific materials, specific processing and the percentage of value. With regard to the latter aspect, up to 15% of the value of the final product may be imported from other countries.<sup>318</sup>

### 3.1.8.2 Cumulation of origin

In order to make the application of the rules of origin easier and more flexible, the TDCA also provides for cumulation of origin, enabling the EU and South Africa to use material originating in other countries without violating the rules of origin.<sup>319</sup>

In terms of bilateral trade, the TDCA, according to Protocol 1 Article 3 (1) TDCA, allows for “partial or diagonal cumulation”. This means that imported material has to meet the rules of origin applicable to that specific intermediate product, but will be

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<sup>315</sup> EU COM *TDCA between the EU and RSA* (1999) 51; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001);

<sup>316</sup> EU COM *TDCA between the EU and RSA* (1999) 52; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001);

<sup>317</sup> Hoekman/Kostecki *From GATT to WTO* (1995) 102.

<sup>318</sup> EU COM *TDCA between the EU and RSA* (1999) 52-53; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001).

<sup>319</sup> Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee SA-*EU Trade, Development and Cooperation Agreement* (1999) 8; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001); DTI TDCA (1999) 7.



considered as material originating in the importing country when incorporated into a product obtained there.

With regard to SACU, Protocol 1 Article 3 (4) TDCA applies "full cumulation" to the BLNS countries. This means that materials originating in BLNS that are incorporated into South African exports are regarded as originating in South Africa, irrespective of the amount of the value added in whatever part of the SACU territory. Processing carried out in the BLNS countries is not regarded as conferring origin. As a result, for example, South African shoe manufacturers can use materials from the BLNS countries and still give their products a "Made in South Africa" label.

As far as cumulation within the context of the Lomé Convention is concerned, Protocol 1, Article 3 (5) TDCA stipulates that goods using material from other ACP countries are also defined as originating in South Africa – and are therefore eligible for preferential access to the EU market – provided that the value added in South Africa exceeds the value of ACP materials. If this is not achieved, the ACP State accounting for the highest value of originating materials used will be considered as product origin. This means that ACP countries, including BLNS, will be able to cumulate with materials which have acquired originating status in South Africa.<sup>320</sup>

There has been some criticism that the TDCA does not make provision for cumulation in the case of South African inputs being used in the production of the BLNS produced goods destined for export to the EU. This means, for example, that a men's suit manufacturer in a BLNS country can use mixed fibre cloth purchased from a German manufacturer for the production of men's suits for duty-free export to the EU, but can not use mixed fibre cloth manufactured in South Africa, without losing the duty-free access granted under the trade provisions of the Lomé Convention.<sup>321</sup>

Indeed, only full cumulation in both directions would have acknowledged the true nature of SACU as a single customs territory. However, the TDCA is open to revision and the rules of origin as they stand only represent a temporary solution. In order to promote regional economic integration, the formal enlargement of the rules of origin

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<sup>320</sup> Tekere "Implications of SA-EU TDCA on Southern Africa: a view from Zimbabwe" *IGD Occasional Paper No 24* (2000) 76; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 8; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>321</sup> Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 80.



(full cumulation in both directions) to the BLNS therefore has to be seen as a logical step in the future.<sup>322</sup>

As a positive aspect of the rules of origin, it is to be acknowledged that the rules governing the documentary evidence of origin (Protocol 1, Articles 14-29 TDCA) are designed in a user-friendly manner, despite their highly technical nature, so that the ability of economic operators to make use of the new market access opportunities are not unduly charged with complicated paper work. This makes the application of the rules of origin easier and should lead to an increase in the trade between the parties.

### 3.1.8.3 List rules

The agreement further contains "List rules" in Appendix 2 of Protocol 1 TDCA. These are specific rules for specific products. They describe the working or processing to be carried out on non-originating materials in order that the final product can obtain originating status.<sup>323</sup> South Africa's view was that some of these rules did not reflect the level of productive capacity in South Africa. This matter is still under consideration by the EU.<sup>324</sup>

### 3.1.8.4 Value tolerance rule

As in the case of cumulation of origin, Protocol 1 Article 5 TDCA allows a certain percentage of the final product to be imported from other countries, notwithstanding the conditions set out in the list rule.<sup>325</sup> This value tolerance rule allows for products to be considered as originating in South Africa even if the origin rules have not been respected for some of the materials used. According to Article 5 (2) a) of the Protocol,

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<sup>322</sup> Solignac Lecomte *The impact on Lomé* (2000) 63.

<sup>323</sup> EU COM *TDCA between the EU and RSA* (1999) 64-65; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); [www.europa.eu.int/eur-lex/de/lif/dat/1999/de\\_299A1204\\_02.htm](http://www.europa.eu.int/eur-lex/de/lif/dat/1999/de_299A1204_02.htm), (29.05.2000); Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 8; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>324</sup> These products are: cream yoghurt, tea, peanut butter, fruit juices, beverages; DTI *TDCA* (1999) 8; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 8; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>325</sup> EU COM *TDCA between the EU and RSA* (1999) 52; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); DTI *TDCA* (1999) 8.



the Agreement makes provision for a general tolerance of 15% with the exception of textiles, fishery products, tobacco products and alcohol, for which the maximum is 10%.<sup>326</sup>

### 3.1.8.5 Fishery products

An exception to the standard rules of origin will become applicable as soon as the EU starts applying trade preferences to South African fishery products. According to Protocol 1 Article 4 (2) TDCA, the exception relates to South African fishing vessels, where fish caught by these boats will be considered to be of South African origin if at least half of the leadership (the master and the officers) and of the crew on board are South African, EU or ACP nationals.<sup>327</sup>

### 3.1.9 Sectoral agreements

In its Appendix the TDCA further contains sectoral agreements on Fishing and on Wine and Spirits. According to Article 107 TDCA, both agreements are part of the overall agreement.

#### 3.1.9.1 The Fishing Agreement

The fishing agreement proved to be a major obstacle to concluding a deal. The Spanish government was seeking access to South Africa's fishing waters without any

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<sup>326</sup> EU COM *Partners in Progress* (1999) 12; EU COM *TDCA between the EU and RSA* (1999) 52; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); DTI *TDCA* (1999) 8; under the standard rules applied by the EU to other preferential partners, a value tolerance of up to 10 % of the value of the final product is allowed, with the exception of the textiles sector.

<sup>327</sup> DTI *TDCA* (1999) 8; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 9; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001); EU COM *Partners in Progress* (1999) 12; EU COM *TDCA between the EU and RSA* (1999) 51-52; DTI *TDCA* (1999) 8; [http://europa.eu.int/eur-lex/de/lif/dat/1999/de\\_299A1204\\_02.htm](http://europa.eu.int/eur-lex/de/lif/dat/1999/de_299A1204_02.htm), looked up on the 29.05.2000; this is more favourable than other agreements that have a 75 % nationality requirement for the crew and a 100 % nationality requirement for masters and officers.



restrictions.<sup>328</sup> Furthermore, the EU made a linkage between the Fishing Agreement and market access concessions, as well as the overall agreement.<sup>329</sup>

South Africa, in contrast, was willing to grant access to its fishing resources only if it would be to the benefit of both parties. Under these terms South Africa would grant Spain access to fish in its waters, but would insist on Spain docking the fish at South African harbours for processing before being exported to Spain. This would lead to the transfer of technology and employment opportunities for South Africans. In addition, South Africa would have greater control over how much Spain would fish. Currently South Africa does not have the necessary patrolling vessels or legislation in place to prevent over-fishing.<sup>330</sup>

In a political effort to conclude the talks, an agreement regarding the future fisheries cooperation was reached in December 1998. This agreement included a declaration that both parties would endeavour to negotiate and conclude a cooperation agreement in the fishing sector no later than the end of 2000. Until then the EU will hold back on tariff concessions for South African fish exports. South Africa, in turn, will abolish its tariffs on fisheries products only as *quid pro quo* for the elimination of duties of the corresponding tariff positions by the Community.<sup>331</sup> Finally, in Article 62 TDCA, both parties determined that it is in their reciprocal interest to use one another's fishing resources and that they are both committed to reaching a long-term fishing agreement as soon as possible.<sup>332</sup> This has not been achieved yet and the matter is therefore still under consideration.

### 3.1.9.2 The Wine and Spirits Agreement

As indicated above, the separate cooperation agreement on wine and spirits proved to be one of the major stumbling blocks in coming to an agreement towards the end

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<sup>328</sup> Bertelsmann-Scott „The EU, SA and the FTA“ *SAYII* (2000) 117; Davies *Forging a new relationship with the EU* (2000) 8; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 9; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>329</sup> DTI *TDCA* (1999) 9.

<sup>330</sup> Bertelsmann-Scott „The EU, SA and the FTA“ *SAYII* (2000) 117.

<sup>331</sup> Bertelsmann-Scott „The EU, SA and the FTA“ *SAYII* (2000) 117; DTI *TDCA* (1999) 9.

<sup>332</sup> EU COM *TDCA between the EU and RSA* (1999) 26; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 9; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).



of the negotiations. Intense diplomacy finally secured approval from the EU heads of government at the end of March 1999.<sup>333</sup> The compromise reached regarding Port and Sherry contains the following main elements, according to appendix 10 TDCA:<sup>334</sup>

- South Africa reconfirms that the names "Port" and "Sherry" are not and will not be used for its exports to the EU.
- South Africa will phase out the use of the "Port" and "Sherry" names on all export markets within five years, except in the case of non-SACU SADC countries, where an eight-year phase-out period would apply.
- For the purpose of the Wines and Spirits Agreement, the South African domestic market is defined to cover SACU.<sup>335</sup>
- South African products may be marketed as Port and Sherry on the South African domestic market during the twelve-year transition period covered by this agreement. Beyond that period the denominations of these products on the South African domestic market will have to be jointly agreed between South Africa and the EU.
- From entry into force of the agreement, the EU will provide a duty-free quota for wines covering the current level of trade of 32 million litres of South African exports to the EU, with allowance for the future growth of this quota.<sup>336</sup>
- As an additional effort to the main objectives agreed on for the Development programme for South Africa to be funded by the EU, the EU will provide assistance of fifteen million € for the restructuring of the South Africa wines and spirits sector and for the strengthening of marketing and distribution of South Africa wines and spirits products.

<sup>333</sup> See Chapter 2.11; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 10; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>334</sup> EU COM *TDCA between the EU and RSA* (1999) 48; [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 116-117; [http://europa.eu.int/eur.lex/de/lif/dat/1999/de\\_299A1204\\_02.htm](http://europa.eu.int/eur.lex/de/lif/dat/1999/de_299A1204_02.htm), (29.05.2000); Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 10; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>335</sup> According to Article 19 (1) of the SACU Agreement (see appendix 1) the BLNS countries could have used their veto right against this. They did not do so.

<sup>336</sup> See Chapter 2.11: The wine and spirits agreement has not been concluded yet and the EU does not provide yet assistance of fifteen million € for the South African wine and spirits industry. However, the duty free access of wine is a fact. France made an attempt to go its own way and find a compromise with South Africa on this issue. They did not succeed.



### 3.2 Evaluation of the TDCA

Negotiations between the EU and South Africa for the TDCA were very complicated. During several negotiating rounds, South Africa was close to announcing that it was not prepared to continue negotiations for a free trade agreement on the EU basis. Pressure was building up behind the South African negotiators to take a tough line with the EU and parliamentarians and public opinion were highly critical of the EU limitations on South Africa exports. However, the EU and its Member States had to get themselves in order to meet the 1999 Maastricht conditions,<sup>337</sup> which meant further tightening of economies. Therefore protectionist sentiment among the EU had hardened.<sup>338</sup> For these reasons, there are different opinions about the concluded deal between the two parties, which makes an evaluation of it necessary.

In the opinion of Goodison,<sup>339</sup> the free trade agreement between the two parties is anything but "free", because many sensitive sectors have been excluded from the deal. He argues that exports of these sensitive products certainly would not disrupt EU markets in the commodities concerned. In his eyes exports from South Africa are not large enough in most of the sensitive products to have any market impact at all and therefore the exclusion of products from the deal is a political manoeuvre more than an economic one. In Goodison's opinion the disappointing impact of the proposed FTA suggests that any positive trade effects on neighbouring regional economies arising as a result of increased growth in South Africa stimulated by the EU-SA TDCA, are likely to be marginal.<sup>340</sup>

Obeng and Mc Gowan argue that the TDCA suggests disproportionate gains for the EU and is more a new kind of European colonialism. In their opinion the EU ignores the realities of its skewed trade flows with South Africa, the fact that South Africa is already excluded from preferential trade arrangements with other countries at

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<sup>337</sup> These are the criteria that every Member State had to fulfill in order to participate in the monetary union for the new European common currency, the Euro. The criteria are listed in Article 104 ECT. With the exception of four Member States, the Euro will be introduced in the other eleven Member States on the 1<sup>st</sup> of January 2002.

<sup>338</sup> Louw "EU trade" *Southern Africa Report* (1997-01-17) 10-11.

<sup>339</sup> Goodison *The EU's trade and development policy* (1997) 54.

<sup>340</sup> Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 36-37.



comparable levels of development, and that the South African economy is currently undergoing fundamental restructuring. They think that the outcome of the four-year ordeal is disappointing and the final deal is distant from South Africa's initial negotiating position.<sup>341</sup> In their opinion, the phasing out of the terms "Sherry" and "Port" demonstrates the selfish nature of EU's free trade relations with South Africa. Moreover, the South African Minister of Trade and Industry said in an interview in April 1999 that South Africa "is not prepared to concede on the exclusive geographic denominations of the terms Port and Sherry."<sup>342</sup> Obeng and Mc Gowan argue that this conduct is inconsistent with the EU's own commitment to assist South Africa during its difficult socio-economic transition, and that it is questionable whether the principles of reciprocity and asymmetry are being "equitably" applied to South Africa.<sup>343</sup> The EU's phasing out of the terms "Port" and "Sherry", its exclusion of South African products that are competitive in European markets, as well as its demand for fishing quotas from South Africa, are likely to have detrimental effects on the fragile South African economy. Moreover, they criticize the fact that the adjustment cost for South African industry will be higher than for Europe, which could have a negative impact on the whole Southern African region.<sup>344</sup>

Van Heerden criticizes the fact that the issue of non-tariff barriers is not directly addressed in the Agreement.<sup>345</sup> From his point of view, the Agreement makes provision to challenge companies that enjoy a dominant market position, ostensibly to promote competition and investment. In his opinion, the nature of the South African economy would suggest that EU companies operating in South Africa would be in a relatively strong position to challenge mergers and take-overs in South Africa, whilst it is feared that South African companies will be less successful in this area when their interests are threatened in the EU. Furthermore, he mentions that there is serious concern about the capacity of South African customs and related authorities

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<sup>341</sup> Obeng & Mc Gowan "The EU-SA FTA" *SAJII* (1999) 104.

<sup>342</sup> Erwin "Interview with Alec Erwin" *Global dialogue* (08/1999) 20.

<sup>343</sup> Obeng & Mc Gowan "The EU-SA FTA" *SAJII* (1999) 105.

<sup>344</sup> Obeng & Mc Gowan "The EU-SA FTA" *SAJII* (1999) 110.

<sup>345</sup> Jackson *The World Trading System* (1998) 154-155: Non-tariff barriers can be described as valid domestic policies that have been implemented in a way that implicitly restrict international trade. Implicit discrimination against imports is often found in the context of so-called product standards, i.e.: a nation that uses metric measures for tools and small fasteners might require all such products to be marked in metric measures. A valid domestic consumer protection policy might support such requirement, but it might also be introduced because troublesome import competition stems from products that are measured in other units, such as inches or feet.



to police the Agreement, which could be used by third parties to gain preferential access to South African markets.<sup>346</sup>

It has to be admitted that the EU apparently dominated the negotiations to establish the FTA. The EU's mandate predetermined the negotiations on both Lomé and the FTA to a large extent. I, however, do not agree with the criticism cited above and think that South Africa managed to achieve some major negotiating victories, driving the EU well beyond the boundaries of its mandate, which culminated in the TDCA being anything but unfair or unfree.

As far as the political importance is concerned, the agreement is a good indicator of how relations between the EU and poorer countries from the southern hemisphere are likely to develop and it clearly illustrates the situation in which the EU and South Africa find themselves on the international stage at the moment. With regard to South Africa, the agreement elevates the existing relationship to a higher level and provides South Africa with a formalised relationship with the world's biggest trading bloc. This places South Africa in a special and privileged relationship with the EU when compared to many other countries and confirms South Africa's position as a credible player on the global stage. With regard to further trade relations between the EU and ACP countries in the future, the political significance of the TDCA and of South Africa's accession to the ACP group of States should also not be underestimated. Just as the EU is playing an increasingly prominent role in the international community via its Common Foreign and Security Policy, so South Africa has become a significant influence on some aspects of the agenda facing the international community, such as promoting development in developing countries.

In terms of commercial opportunities it is to be acknowledged that the TDCA provides significant market access for South Africa into the huge European market, with an open-ended time frame and a provision for review after five years. On the industrial side the tariff liberalisation provides close to 100% duty-free access for South African products after the ten-year transition period. On the agricultural front, the TDCA is the first agreement to include the EU's agricultural sector. For this reason, South Africa succeeded in obtaining greater liberalisation than many thought possible, given the

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<sup>346</sup> Van Heerden *Implications for South Africa* (2000) 96.



sensitivity of the EU in this area. This is also significant in that transfers of technology can take place with countries that are on the cutting edge of new technologies. In this respect, one should also remain aware of the reciprocal nature of the agreement.

Furthermore, it should be remembered that the agreement contains safeguard and regional safeguard clauses, which can be deployed, should a displacement take place due to an influx of products from the EU. Concerning the Common Agricultural Policy, which remained untouched in the agreement, the TDCA itself provides for considerable safeguards against any negative CAP effects on the agreed concessions. Built-in review clauses will also ensure that the effects of tariff liberalisation work to the benefit of both parties.

In terms of the developmental character of the agreement, the TDCA confirms that the EU will continue to assist South Africa in important areas of developmental assistance. The Science and Technology Agreement allows South Africa to build, develop and further improve its scientific and technological capacities. This underlines that the agreement between the EU and South Africa is about much more than trade. The developmental character of the agreement becomes clear in the clause of political dialogue between the two parties and the good-governance clause. Furthermore, social and cultural cooperation is another aspect of the agreement that promotes a better understanding of the different societies.

With regard to the whole Southern African region, the EU had to take account of the fact that the agreement, although bilateral in nature, would have a significant impact on the region. On the one hand the interests of other SACU countries have been well catered for in the agreement, through several complementary provisions: a special mention in the safeguard clause, the exclusion on the South African side of sensitive products like beef and sugar and the possibility of special assistance to the BLNS states under the cooperation programme with South Africa.

On the other hand it is rather doubtful whether these measures are sufficient to promote regional economic cooperation in the SACU. One shortcoming, for example, is the composition of the Cooperation Council. At present the BLNS governments are not represented in it. However, since the EU-SA FTA will have an impact on the whole Southern African region, a strong case exists for opening up the Cooperation



Council to BLNS participation. This would appear to be wholly consistent with the general positions of principle expressed by both South Africa and the EU.<sup>347</sup>

Furthermore, the issue of extending regional cumulation, so as to allow BLNS and other Southern African regional producers to make more effective use of South African inputs in the goods they produce for export to the EU under the trade provisions of the Lomé Convention, was completely dropped from the EU-SA TDCA.<sup>348</sup> This, however is a very important issue for BLNS countries, because it could provide a vehicle for the BLNS exports to the EU market.<sup>349</sup> Therefore there is a need to address this issue constructively in the future talks between the parties.

The TDCA, to a large extent, marks the end of an era of tariff protection in bilateral trade and it provides for many new opportunities, despite some critical aspects. However, one has to bear in mind that the agreement only provides a legal framework for the bilateral trade relations between the EU and South Africa and that the outcomes of the TDCA are not predetermined. In how far the objectives of the TDCA can be realized, depends on the performance of South Africa's economy itself.<sup>350</sup> The EU-SA TDCA could mark the beginning of a "win-win" relationship only if the South African economy manages to become globally competitive.

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<sup>347</sup> Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 65.

<sup>348</sup> Lowe *Main Parameters* (2000) 44.

<sup>349</sup> Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 80.

<sup>350</sup> Wakeford *The EU-SA Agreement: Opportunities and challenges for Business* in: Bertelsmann-Scott, Mills, Sidiropoulos (ed) *The EU-SA Agreement-South Africa, Southern Africa and the European Union* (2000) 99-104: giving several examples of which topics need to be addressed.



#### **4. The status of international agreements and of the GATT / WTO provisions and the consequences for the TDCA**

Since 1947 international trade relations have been governed largely by the General Agreement on Tariffs and Trade (GATT).<sup>351</sup> This international agreement has now been subsumed in the form of GATT 1994 into the new World Trade Organization (WTO), which came into being on 1 January 1995.<sup>352</sup>

Since the TDCA between the EU and South Africa had to satisfy international rules, the provisions of the General Agreement on Tariffs and Trade (GATT) trade regime were of major importance. The EU, in particular, repeatedly emphasised its determination that every accord had to be in line with the rules of the World Trade Organisation (WTO) if both parties wanted to ensure that the outcome of negotiations would not be challenged by third parties, with the risk of being forced into renegotiation or the granting of compensations to outsiders.<sup>353</sup> However, apart from article 300 (7) ECT, which provides that international agreements are binding on the institutions and on the Member States, the EC Treaty does not contain any provision that indicates whether, or how, an international agreement like the GATT/WTO penetrates the Community's legal order.<sup>354</sup>

Therefore, the status of international agreements, in general, and of the GATT/WTO, in particular, in the legal order of the European Community and of South Africa, has to be analysed to evaluate how far the TDCA between the EU and South Africa has been influenced by these rules. Since South Africa and the EU agreed to establish a Free Trade Area between them,<sup>355</sup> there will, furthermore, be an attempt to

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<sup>351</sup> Jackson *The World Trade Organization – Constitution and Jurisprudence* (1998) 17.

<sup>352</sup> Jackson *WTO – Constitution and Jurisprudence* (1998) 1.

<sup>353</sup> EU COM Speech of Philip Lowe at the Conference of the South African Institute of International Affairs 2-3 September 1999: *Assessing the EU - SA Agreement - Main parameters of the EU-SA partnership* (1999) at [www.europa.eu.int/comm/dg08/speeches.htm](http://www.europa.eu.int/comm/dg08/speeches.htm) (15.03.2001); Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 10; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).

<sup>354</sup> Bourgeois *The European Court of Justice and the World Trade Organisation: Problems and Challenges* in: Weiller (ed) *The EU, the WTO and the NAFTA – towards a common law of international trade* (2000) 77.

<sup>355</sup> See Chapter 3.1.2.1.



determine the extent to which the TDCA is in line with the GATT/ WTO provisions dealing with preferential trade agreements.

#### **4.1 The status of international agreements and the GATT / WTO provisions**

##### **4.1.1 International agreements in EU law**

###### **4.1.1.1 The Haegeman case**

The *Haegeman* judgement may serve to illustrate that the European Court of Justice (ECJ) regards the relationship between international law and Community law as monist.<sup>356</sup> The *Haegeman Case*<sup>357</sup> concerned a reference for a preliminary ruling by a Brussels court. In the proceedings before this tribunal the Belgian company R. & V. Haegeman, which imported Greek wine, sought repayment of countervailing duties imposed on it by the Belgian customs authorities on the basis of Council Regulation 816/70 "laying down additional provisions for the common organisation of the market in wine". Before the adoption of this regulation, imports of Greek wine into Benelux territory had not been subject to any customs duties or quantitative restrictions. Haegeman contended that the imposition of those charges was unlawful and

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<sup>356</sup> Case 181/73 *R. & V. Haegemann v. Belgium State* (1974) E.C.R. 449; [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61973J0181; 21.02.2001); Bourgeois *The ECJ and the WTO* (2000) 90 and 93; Hilpold *Die EU im GATT/WTO SYSTEM* (1999) 183: In a monist state, the legal system is considered to include treaties to which the state has an obligation. Thus the monist theory proceeds from the assumption that a national legal system includes international agreements which bind the State, without the need for transformation of such treaties into domestic law. Such treaties are "directly applied", or "self executing". In a dualist State, treaties are part of a legal system separate from that of the domestic law. Here an "act of transformation" is needed for the treaty rule to operate in the domestic legal system, that is, there must be an action by that State which transforms the treaty norm into domestic law.

Although the ECJ regards the relationship between international law and Community law as monist, the relationship between international law and the law of an individual Member State of the EU may not automatically be regarded as monist. Among the Member States there are three different approaches. In a first category (e.g. Belgium, France, Netherlands) an international agreement entered into by the State that has been duly approved by the state and has entered into force in the international plane automatically becomes part of the law of the state, without any separate act of transformation being required. In a second category (e.g. Germany and Italy) an international agreement of itself has no effect in the internal legal system and requires a legislative act in order to produce an effect. Once such an act is passed, the international agreement is applicable as such. In a third category (e.g. Denmark and the UK) the effect of an international agreement is dependent upon a process of transformation: an international agreement, as such, has no effect, and the effect is produced only by national rules which purport to incorporate the international agreement.

<sup>357</sup> Case 181/73 E.C.R. (1974) 449, 472-473; [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61973J0181; 21.02.2001)



infringed the (then) Association Agreement between the EC and Greece, which accorded equal treatment.<sup>358</sup>

The Belgian judge argued that the ECJ did not have direct jurisdiction under Article 234 ECT to rule on the interpretation of an international agreement such as the Association Agreement with Greece. In his view, the ECJ's jurisdiction could only arise where interpretation was relevant to the question of the validity of an act of a Community institution, or to the question of the interpretation to be given to such an act.

The Court, however, did not agree. It stated that the 1961 Association Agreement was an act of one of the institutions of the Community, since it was concluded by the Council under Articles 300 and 310 ECT. In the ECJ's opinion the provisions of the agreement formed "an integral part of Community" law and the Court, accordingly, had jurisdiction to deliver preliminary rulings concerning the interpretation of that agreement.<sup>359</sup> The judgement thus entailed that, just as Community law is integrated into the legal systems of the Member States, international agreements concluded by the Community enter the Community legal order *as such* - without an act of transformation. Thus the relationship between international law and Community law is monist.<sup>360</sup>

#### 4.1.1.2 The Kupferberg case

The ECJ reconfirmed and clarified its opinion in the *Kupferberg* case.<sup>361</sup> In this case the Hauptzollamt Mainz levied a monopoly equalisation duty against Kupferberg when he cleared a consignment of port wines from Portugal through customs. Following the German law on the monopoly in spirits, such a monopoly equalisation duty is levied on imported spirits and spirit products. Port wines are regarded as

<sup>358</sup> Case 181/73 E.C.R. (1974) 449, 472-473; [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61973J0181; 21.02.2001).

<sup>359</sup> Case 181/73 E.C.R. (1974) 449, 459-460 (paragraphs 2-6); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61973J0181; 21.02.2001); Hilpold *Die EU im GATT/WTO System* (1999) 171: this qualification by the ECJ was not made for GATT/WTO provisions.

<sup>360</sup> Kuilwijk *The European Court of Justice and the GATT Dilemma: Public Interest versus Individual Rights* (1996) 84; for further discussion on whether the ECJ is following a dualist or a monist approach, see Bourgeois *The ECJ and the WTO* (2000) 93-94.

<sup>361</sup> Case 104/81 *Hauptzollamt Mainz v. C.A. Kupferberg & Co* (1982) E.C.R. 3641; [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61981J0104; 21.02.2001).



liquor wines and, due to an alcohol content of more than 14% by volume, are considered to be spirit products. Kupferberg contested the imposition of the duty and asked the ECJ to declare the German monopoly equalisation duty unlawful, alleging that it violated Article 86 ECT and Article 21 (1) of the FTA between the EC and Portugal.

The ECJ ruled that Article 21 (1) of the Agreement was directly applicable. It held that agreements concluded under Article 300 ECT are binding upon both the Community and the Member States. The ECJ deemed it incumbent upon the Community institutions, as well as upon the Member States, to ensure compliance with the obligations arising from such agreements. Member State obligations emanating from agreements concluded by the Community institutions create rights and obligations to the Community itself "which has assumed responsibility for the due performance of the agreement."<sup>362</sup> In other words, the EC must rely on the Member States to assure the fulfillment of its obligations towards the third State. Accordingly, the ECJ once again described the provisions of such an agreement as an "integral part of the Community legal system."<sup>363</sup>

#### 4.1.1.3 The Demirel case

The ECJ had a further opportunity to consider the relation between community and state law in the *Demirel* Case.<sup>364</sup> In this case the request for a preliminary ruling by the ECJ was made by a German court in which Mrs Demirel, a Turkish national, challenged her expulsion from Germany. The expulsion was ordered on the grounds that her visa, which was only valid for a visit, had expired. Mrs Demirel wanted to remain in Germany with her husband who resided in Germany. She relied on the Association Agreement between the EC and Turkey.<sup>365</sup>

In the opinion of the German court the matter involved an interpretation of this Association Agreement and the court therefore made a request for a preliminary

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<sup>362</sup> Case 104/81 E.C.R. (1982) 3641, 3662 (paragraph 13); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61981J0104; 21.02.2001).

<sup>363</sup> Ibid.

<sup>364</sup> Case 12/86 *Meryem Demirel v. Stadt Schwäbisch Gmünd* (1987) E.C.R. 3719; [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61986J0012; 21.02.2001).

<sup>365</sup> Case 12/86 E.C.R. (1987) 3719, 3750 (paragraph 6); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61986J0012; 21.02.2001).



ruling by the ECJ. Before the ECJ, the German Government and the United Kingdom challenged the jurisdiction of the ECJ to interpret the Association Agreement. In the case of a mixed agreement,<sup>366</sup> they argued, the ECJ's jurisdiction does not cover an area which falls under the exclusive competence of the Member States, such as the free movement of workers from third states. With reference to the *Haegeman* judgement, the ECJ, however, simply declined to decide the issue, stating that those provisions came within the Community's extensive and special competence to conclude and interpret Association Agreements.<sup>367</sup> Concerning the question of the exclusive competence of the Member States in those issues, the ECJ pointed out that "Article 310 ECT must necessarily empower the Community to guarantee commitments towards non-member countries in all the fields covered by the Treaty. Since freedom of movement of workers is, by virtue of Article 39 ECT, one of the fields covered by that Treaty, it follows that commitments regarding freedom of movement fall within the powers conferred on the Community by Article 310 ECT."<sup>368</sup>

#### 4.1.1.4 The Sevince case

In the *Sevince* case the question arose whether the ECJ also had jurisdiction over decisions adopted by the Association Council under the same mixed agreement with Turkey.<sup>369</sup> The background of this case was as follows. In 1979 Mr Sevince, a Turkish national, was granted a residence permit in The Netherlands, on the ground that he had married a Turkish national resident. When he applied for an extension of his residence permit, the *Staatssecretaris van Justitie* rejected the application because he and his wife had separated. Therefore the circumstances on the basis of which the residence permit had been issued no longer existed. Mr Sevince's application for review and his appeal were dismissed in 1986. Meanwhile he had obtained an employment certificate and again applied for a residence permit, arguing that he had now been employed in The Netherlands for a number of years. He

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<sup>366</sup> Bourgeois *The ECJ and the WTO* (2000) 83: a mixed agreement is an agreement that comes within the competence of the Community, as well as within the competence of the EC Member States.

<sup>367</sup> Case 12/86 E.C.R. (1987) 3719, 3750 (paragraph 7); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61986J0012; 21.02.2001).

<sup>368</sup> Case 12/86 E.C.R. (1987) 3719, 3751 (paragraph 9); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61986J0012; 21.02.2001).

<sup>369</sup> Case 192/89 S.Z. *Sevince v. Staatssecretaris van Justitie* (1990) E.C.R. I-3461; [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61989J0192; 21.02.2001).



thereby relied on provisions of Decisions 2/76 and 1/80 of the EC-Turkey Association Council. Those decisions give a Turkish Worker free access to any employment of his choice, after a certain period of legal employment in a Member State of the EC.<sup>370</sup> The Dutch court decided to refer the case to the ECJ, considering the fact that the dispute involved interpretation of the provisions of Decisions 2/76 and 1/80 of the EC-Turkey Association Council.

In its judgement the ECJ referred to previous rulings, including *Haegeman* and *Demirel*, and held that, because of their close link to the agreement to which they gave effect, such decisions form an integral part of the Community legal system. In the view of the ECJ, it also had jurisdiction to make interpretations of those decisions.<sup>371</sup> Furthermore the ECJ also referred to the above-quoted passage in *Kupferberg* concerning the requirement of uniform application.<sup>372</sup>

#### 4.1.1.5 Conclusion

Though the EC Treaty provisions do not offer much guidance on the status of international agreements in the EC legal system and though the institutional provisions are silent on the question of how an international agreement binding on the EC becomes part of the EC law,<sup>373</sup> the attitude of the ECJ in resolving those issues gave an answer.

In the *Haegeman* judgement, the ECJ decided that the provisions of the Association Agreement form an integral part of the Community legal system.<sup>374</sup> Therefore international agreements concluded by the Community are integrated into the Community legal system and no particular act of transformation is required.

In the *Kupferberg* case, the ECJ reaffirmed its monist view of the relation between international agreements and Community law. Furthermore it made clear that the

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<sup>370</sup> Case 192/89 E.C.R. (1990) I-3461, I-3500 (paragraph 7); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61989J0192; 21.02.2001).

<sup>371</sup> Case 192/89 E.C.R. (1990) I-3461, I-3500 (paragraphs 9 and 10); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61989J0192; 21.02.2001).

<sup>372</sup> See Chapter 4.1.1.2.

<sup>373</sup> Bourgeois *The ECJ and the WTO* (2000) 77.

<sup>374</sup> Case 181/73 E.C.R. (1974) 449, 459-460 (paragraphs 2-6); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61973J0181; 21.02.2001).



Member States that fulfill their obligations are responsible for the fulfillment not only in relation to the other party, but above all in relation to the Community.<sup>375</sup>

The *Demirel* judgement dealt with an area which falls within the exclusive competence of the Member States. In the opinion of the ECJ, Article 310 ECT, however, was a legally sufficient basis for the Community to conclude association agreements with other parties and to guarantee commitments towards them.<sup>376</sup>

In the *Sevince* case, the ECJ referred to previous rulings, including *Haegemann* and *Demirel*, and held that decisions of the EC-Turkey Association Council also form an integral part of the Community legal system. Therefore the ECJ held that it also had jurisdiction to interpret those decisions.<sup>377</sup>

From these cases it appears that the ECJ is mainly concerned with the uniform application of the law deriving from international agreements concluded by the Community. The common policy of the Community, as reflected in its international agreements, requires that these agreements have the same penetrating force in all Member States. An international agreement concluded by the European Community constitutes an obligation for the Community as well as for the Member States. For the Community this is an obligation under international law and for the Member States it is an obligation under Community law.<sup>378</sup> Therefore, the scope of this Community obligation evidently is a question of Community law, which is to be answered by the ECJ in accordance with Community law, and not by national Courts according to their own domestic law.<sup>379</sup>

#### 4.1.2 The GATT / WTO provisions in EU law

Concerning the status of GATT/WTO provisions in EU law, distinction has to be made between the GATT 1947 Agreement and the GATT 1994 Agreement.

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<sup>375</sup> Case 104/81 E.C.R. (1982) 3641, 3662 (paragraph 13); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61981J0104; 21.02.2001).

<sup>376</sup> Case 12/86 E.C.R. (1987) 3719, 3750 (paragraph 7); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61986J0012; 21.02.2001).

<sup>377</sup> Case 192/89 E.C.R. (1990) I-3461, I-3500 (paragraphs 9 and 10); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61989J0192; 21.02.2001).

<sup>378</sup> Kuilwijk *The ECJ and the GATT Dilemma* (1996) 90.

<sup>379</sup> Kuilwijk *The ECJ and the GATT Dilemma* (1996) 90; Eeckhout "The domestic legal status of the WTO" *The Common Market Law Review* (1997) 22. Eeckhout comes to the same conclusion, but in respect of the status of the WTO agreement.



GATT 1947 was concluded before the establishment of the European Community (EC) in 1957 and all its Member States were contracting parties to it.<sup>380</sup> The EC, however, has never become a contracting party to the GATT 1947 and it therefore is not binding on the European Community by virtue of Article 300 ECT.<sup>381</sup> But, since the Member States were contracting parties to the GATT 1947, it had to be respected by the Community under Article 307 ECT.<sup>382</sup> The GATT 1947 Agreement, however, was replaced by the GATT 1994 Agreement in April 1994, establishing the World Trade Organization,<sup>383</sup> which came into effect on 1 January 1995.<sup>384</sup>

In connection with the agreement between the EU and South Africa, the status of GATT 1947 in the Community legal system thus did not have any influence on the conclusion of the TDCA in October 1999. However, the status of both agreements, GATT 1994 and 1947, needs to be examined, in order to give a complete overview of the GATT status in the Community legal system, in the following.

#### 4.1.2.1 The International Fruit Company case

Since the Member States were contracting parties to GATT 1947, but not the EC itself, questions arose about whether the European Community could also be bound by an international agreement entered into by the Member States and whether the provisions of GATT 1947 were applicable in the EC legal system.

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<sup>380</sup> Concerning the "Membership": Jackson *WTO - Constitution and Jurisprudence* (1998) 59: He states that GATT, in theory, was not an organisation and therefore did not have "members". The terminology used to emphasize this theory in the agreement was "contracting party". Following Jackson we can fairly speak of "membership" in light of the evolution of GATT into a de facto organisation.

<sup>381</sup> Bourgeois *The ECJ and the WTO* (2000) 71.

<sup>382</sup> Kuijlik *The ECJ and the GATT Dilemma* (1996) 91.

<sup>383</sup> Petersmann *The GATT/WTO Dispute Settlement System - International law, International Organizations and Dispute Settlement* (1997) 3; Jackson/Davey/Sykes Jr. *Legal problems of international economic relations - cases, materials and text on the national and international regulation of transnational economic relations* (1995) 289; Jackson *The World Trading System* (1998) 48; Although the WTO is not, formally and legally speaking, a successor agreement to the GATT 1947 in the sense of the international law of treaties, the WTO multilateral system as such can be considered the successor to the former GATT system. Wider coverage and genuine thrust for universal participation, however, make the WTO system clearly distinct from the old GATT system.

<sup>384</sup> Jackson *The WTO - Constitution and Jurisprudence* (1998) 133 and 170: Both the Republic of South Africa and the European Communities are members of the WTO; WTO *World Trade Organization - Trading into the Future* (1998) 4; Cottier *GATT-Uruguay Round* (1995) V; [www.dti.gov.za/review.asp?iSDivID=86&iEvent\\_ID=105](http://www.dti.gov.za/review.asp?iSDivID=86&iEvent_ID=105).



In the *Third International Fruit Company* case the ECJ was confronted with this question for the first time.<sup>385</sup> The facts of this case were as follows:

In 1970 an increase in the domestic apple production of several Member States led the Commission to take protective measures in order to limit imports to a level that the Community could reasonably absorb. The International Fruit Company of The Netherlands, an importer of apples from a non-Member State, requested the appropriate Dutch authority, the Produktschap voor Groenten en Fruit, to issue them with the necessary certificates. Upon rejection, the International Fruit Company challenged the denial of import certificates and the underlying Council regulations. In doing so, the importer relied on Article XI GATT, which prohibits the institution or maintenance of quantitative restrictions, except under certain circumstances and upon observance of certain formalities.<sup>386</sup>

In its judgement, the ECJ first stated that the European Community *as such* became a party to GATT by way of succession and that, for this reason, the GATT provisions became legally binding on the Community. According to the Court, it is clear that the incompatibility of a Community measure with a provision of international law can only affect the validity of such a measure if the Community is also bound by that provision. Although the Community had not existed when GATT was created in 1948 and never formally acceded to GATT, Article 307 ECT indicated the Member States' clear intention that the Community be bound by the GATT obligations.<sup>387</sup> Furthermore, in the view of the ECJ, the other GATT contracting parties recognized the European Community role in representing the Member States in GATT affairs. This was brought about by the fact that, since the enactment of the EC Treaty and, in particular, since the establishment of the common external tariff, the transfer of powers in the relations between the Member States and the Community has been made concrete within the GATT framework.<sup>388</sup> The Court concluded its judgement by stating that it "therefore appears that, in so far as under the EEC Treaty the Community has assumed the powers previously exercised by Member States in the area governed by the General

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<sup>385</sup> Case 21/72 *International Fruit Company and Others v. Produktschap voor Groenten en Fruit* (1972) E.C.R. 1219; [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61972J0021; 21.02.2001).

<sup>386</sup> Case 21/72 E.C.R. (1972) 1219-1226; [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61972J0021; 21.02.2001).

<sup>387</sup> Case 21/72 E.C.R. (1972) 1219, 1226 (paragraph 7); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61972J0021; 21.02.2001).

<sup>388</sup> Case 21/72 E.C.R. (1972) 1219, 1227 (paragraph 14-16); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61972J0021; 21.02.2001).



Agreement, the provisions of that agreement have the effect of binding the Community.”<sup>389</sup>

#### 4.1.2.2 The Nederlandse Spoorwegen case

The ECJ reconfirmed its *International Fruit* ruling in the *Nederlandse Spoorwegen* case.<sup>390</sup> In this case, the ECJ was faced with a Community interpretative note to a Regulation that had the effect of increasing the tariff on certain machines in the Netherlands’ customs law. This allegedly violated the tariff concessions agreed to by the Community under Article II GATT. Pursuant to Article II GATT, customs duties should not be levied at rates in excess of those bound under GATT. The ECJ was thus faced with the question of whether a Dutch court was required to apply certain GATT provisions, even though it might thereby come into conflict with Community law.<sup>391</sup>

The ECJ stated that, as regards the fulfillment of commitments under GATT, the Community has replaced the Member States and it is now generally recognized that the Community has succeeded to the rights and obligations of the Member States.<sup>392</sup> The ECJ accordingly regarded GATT 1947 as part of Community law, which is a legally binding agreement for the Community itself.<sup>393</sup> For this reason, the Dutch Court could apply the GATT provisions without coming into conflict with Community law.

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<sup>389</sup> Case 21/72 E.C.R. (1972) 1219, 1227 (paragraph 17-18); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61972J0021; 21.02.2001).

<sup>390</sup> Case 38/75 *Douaneagent der N.V. Nederlandse Spoorwegen v. Inspecteur der invoerrechten en accijnzen* (1975) E.C.R. 1439; [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61975J0038; 21.02.2001).

<sup>391</sup> Case 38/75 E.C.R. (1975) 1439; [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61975J0038; 21.02.2001).

<sup>392</sup> Case 38/75 E.C.R. (1975) 1439, 1450 (paragraph 16); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61975J0038; 21.02.2001).

<sup>393</sup> Compare Chapter 4.1.2. GATT 1947 was not binding on the EC by virtue of Article 300 ECT, but it was regarded as a legally binding agreement for the EC after this case; Case 38/75 E.C.R. (1975) 1439, 1450 (paragraph 21); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61975J0038; 21.02.2001).



#### 4.1.2.3 The SIOT case and the SPI/SIAMI case

The ECJ's decision on the legally binding character of GATT for the European Community was reaffirmed in the judgements on the *SIOT* case<sup>394</sup> and the *SPI/SIAMI* case.<sup>395</sup> The cases may be briefly summarized as follows:

In the *SIOT* case, an Italian company in charge of an oil pipeline between Trieste and the Austrian border was charged by the Italian customs authorities to pay a "port charge" and a "revenue charge" for the transition of oil through an oil pipe-line via Italy, in part to Germany and in part to Austria. SIOT challenged the imposition of these duties on the ground that this was in various respects incompatible with Community law and with GATT law, particularly Article V GATT on the freedom of transit.<sup>396</sup>

In the *SPI/SIAMI* case, two Italian importers, SPI and SIAMI, contested the levying of a duty for administrative services on various goods imported by them from third states which were also parties to GATT. The Court was asked to investigate whether the Italian duty for administrative services was incompatible with Article II (1) (b) GATT-bound concessions.<sup>397</sup>

In both *SIOT* and *SPI/SIAMI*, Advocate General Reischl relied on the *International Fruit* case and argued that it had already been established in the case-law relating to GATT that the Community is bound by GATT because it has assumed the powers previously exercised by the Member States within the sphere of application of GATT. He furthermore argued that the Community has, as regards the fulfillment of commitments arising from GATT, replaced the Member States. Furthermore he stated, "it is reasonable to regard GATT as binding on the Community, just as if it

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<sup>394</sup> Case 266/81 *Societa Italiana per l'Oleodotto Transalpino (SIOT) v. Ministero delle Finanze, Ministero della Marina Mercantile, Circonscrizione doganale di Trieste and Ente Autonomo del Porto di Trieste* (1983) E.C.R. 731; [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61981J0266; 21.02.2001).

<sup>395</sup> Joined cases 267-269/81 *Amministrazione delle Finanze dello Stato v. Societa Petrolifera Italiana SpA (SPI) ad SpA Michelin Italiana (SAMI)* (1983) E.C.R. 801; [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61981J0267; 21.02.2001).

<sup>396</sup> Case 266/81 E.C.R. (1983) 731; [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61981J0266; 21.02.2001).

<sup>397</sup> Joined Cases 267-269/81 E.C.R. (1983) 801; [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61981J0267; 21.02.2001).



were an agreement concluded by the Community.” In his opinion, GATT is an integral part of the Community legal order.<sup>398</sup>

The ECJ did not explicitly consider GATT an integral part of the Community legal order. Nevertheless, it reaffirmed that the GATT provisions, like the provisions of all other agreements, are binding on the Community and must be uniformly applied throughout the Community. In the ECJ’s view, any difference in the interpretation and application of provisions binding the Community would jeopardise the unity of commercial policy and create distortions in trade within the Community.<sup>399</sup>

#### 4.1.2.4 The WTO Agreement

In April 1994, the ministers of more than a hundred governments signed the Final Act embodying the results of the Uruguay Round of multilateral trade negotiations achieved after seven and a half years of negotiation. As already mentioned above,<sup>400</sup> GATT 1947 was replaced by the GATT 1994 Agreement establishing the World Trade Organization,<sup>401</sup> which came into effect on 1 January 1995.<sup>402</sup>

The new General Agreement on Tariffs and Trade (GATT 1994), the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (TRIPs), the Dispute Settlement Understanding (DSU) and the Trade Policy Review Mechanism, and all their associated legal instruments, are the main parts of the Agreement establishing the WTO.<sup>403</sup> The WTO is the only international body dealing with the rules of trade between nations and provides the common institutional framework for

<sup>398</sup> Case 266/81 E.C.R. (1983) 731, 789; [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61981J0266; 21.02.2001).

<sup>399</sup> Joined Cases 267-269/81 E.C.R. (1983) 801, 828 (paragraph 14); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61981J0267; 21.02.2001).

<sup>400</sup> See Chapter 4.1.2.

<sup>401</sup> *WTO Agreement establishing the WTO* (1994); Petersmann *The GATT/WTO Dispute Settlement System* (1997) 3; Jackson et al. *Legal problems of international economic relations-cases* (1995) 289; Jackson *The World Trading System* (1998) 48.

<sup>402</sup> *WTO Agreement establishing the WTO* (1994); Jackson *The WTO – Constitution and Jurisprudence* (1998) 133 and 170: Both the Republic of South Africa and the European Communities, are members of the WTO; *WTO World Trade Organization - Trading into the Future* (1998) 4; Cottier *GATT-Uruguay Round* (1995) V; [www.dti.gov.za/review.asp?iSDivID=86&iEvent\\_ID=105](http://www.dti.gov.za/review.asp?iSDivID=86&iEvent_ID=105).

<sup>403</sup> *WTO WTO - Trading into the Future* (1998) 4; *WTO The agreements, overview: a navigational guide* at [www.wto.org/English/thewto\\_e/whatis\\_e/tif\\_e/agrm1\\_e.htm](http://www.wto.org/English/thewto_e/whatis_e/tif_e/agrm1_e.htm) (21.02.2001); *WTO The agreements* at [www.wto.org/english/the\\_wto\\_e/whatis\\_e/tif\\_e/agrm0\\_e.htm](http://www.wto.org/english/the_wto_e/whatis_e/tif_e/agrm0_e.htm); Jackson *WTO - Constitution and Jurisprudence* (1998) 36.



the conduct of trade relations among its Members.<sup>404</sup> The WTO has 140 Members at present.<sup>405</sup>

Since GATT 1947 was replaced by GATT 1994, the status of GATT 1994 in the Community legal system needs to be examined further.

#### **4.1.2.4.1 WTO Membership of the European Community plus its Member States and its consequences**

The process of negotiation and conclusion of the WTO Agreements on the part of the European Community was marked by the question of which entity should negotiate and sign the agreements, the European Community or its fifteen Member States, or both. For practical reasons, it was the European Community, which took part in the Uruguay negotiations on behalf of its Members. However, the European Community, as well as the fifteen Member States, signed the agreements and thus became full Members of the WTO.<sup>406</sup> The Member States ratified the agreements according to their national laws.

The fact that the EC Member States are WTO Members alongside the EC makes it difficult to determine where the demarcation line between Community competence and Member States competence should be drawn and is in itself bound to raise issues in relation to the position of the ECJ on WTO law. As far as GATT 1947 was concerned, the ECJ could take the view that, as a result of the substitution of the EC for the Member States in relation to commitments under GATT, it had the final word on the interpretation of GATT provisions, even in relation to the compatibility of Member States legislation with GATT.<sup>407</sup> This argument is no longer possible. In line with Article XI GATT, both the EC and the Member States signed the final act and

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<sup>404</sup> WTO *WTO - Trading into the Future* (1998) 4; Jackson *From GATT to the World Trade Organization* in: Cottier (ed) *GATT-Uruguay Round* (1995) 35; WTO *What is the World Trade Organization* at [www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact1\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm) (21.02.2001); for further information of the WTO's institutional structure, see Jackson *WTO - Constitution and Jurisprudence* (1998) 66-67.

<sup>405</sup> WTO *WTO - Trading into the Future* (1998) 69, counting 132 members; for a updated list of all Members, see WTO *The organisation, Members and Observers* at [www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (21.02.2001).

<sup>406</sup> Bourgeois *The ECJ and the WTO* (2000) 73; see the list of the members of the WTO at [www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (21.02.2001); WTO *WTO - Trading Into The Future* (1998) 69.

<sup>407</sup> Compare Case 269/81 E.C.R. (1983) 801, 828 (paragraphs 15 and 17); Bourgeois *The ECJ and the WTO* (2000) 73.



therefore share competence. This issue of competence arises especially in relation to the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). In its *Opinion 1/94* on the EC competence to conclude the GATS and the TRIPs Agreements, the ECJ rejected the European Commission view that the EC had exclusive competence to conclude these agreements. The ECJ also rejected the view of the Member States that a number of clauses of the TRIPs Agreement fall within the exclusive competence of Member States. The ECJ was of the opinion that the EC and its Member States are "jointly competent to conclude the TRIPs Agreement".<sup>408</sup> This "joint competence" gives rise to much criticism in the literature<sup>409</sup> and, in my opinion, may cause a lingering handicap in the WTO for both the EC and its Member States.<sup>410</sup>

With regard to the question of applicability, GATT 1994 is different from GATT 1947. The WTO Agreement has been accepted by the Council under Article 300 (7) ECT. For this reason it is binding on the Community and the Member States and is, on that basis, an integral part of the Community legal system without the need for transformation. The Community is responsible to ensure that the laws, regulations and administrative procedures of the Community and its Member States are in conformity with all the Agreements on Trade in Goods, including GATT 1994. By virtue of the fact that these agreements are binding on the Community and its Member States under Article 300 (7) ECT, the provisions of these agreements form an integral part of the Community legal system. They are therefore part of the legal rules under which the Court of Justice exercises control over the actions of the Member States and the Community institutions. Obligations arising from international agreements binding on the Community are "obligations under the Treaty".<sup>411</sup> Non-

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<sup>408</sup> Opinion 1/94 E.C.R. (1983) I-5267 (paragraphs 1-20); [www.curia.eu.int/common/recdoc/indexaz/en/c1.htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1.htm) (document no. 61994V0001; 21.02.2001).

<sup>409</sup> In the view of Bourgeois *The ECJ and the WTO* (2000) 86, Opinion 1/94 signifies an apparent break with previous case law in the area of external relations. He thinks it is possible that a WTO panel or the WTO Appellate Body could be called upon for the uniform interpretation of GATS and TRIPs provisions, if the ECJ fails to do so. Kuilwijk *The ECJ and the GATT Dilemma* (1996) 76, Opinion 1/94 confirmed that the EC is largely characterised and paralysed by the differing interests of its different institutions. In the opinion of Eeckhout "The domestic legal status of the WTO" *The Common Market Law Review* (1997) 20, a mixed approach of the WTO's legal status is undesirable, artificial, and perhaps unworkable.

<sup>410</sup> Nevertheless it is not a main focus of this analysis and therefore will not be examined further.

<sup>411</sup> Kuilwijk *The ECJ and the GATT Dilemma* (1996) 100.



compliance with these obligations justifies an action by the Commission against a Member State for violations of Community obligations.

#### 4.1.2.5 Conclusion

Although the Community itself was never a contracting party to GATT 1947 and although this was not binding on the Community by virtue of Article 300 ECT, it follows from the ECJ's judgements that the Court also considers GATT an integral part of Community law.

In the *International Fruit* case the ECJ stated that the European Community as such became a party to GATT by way of succession and that, for this reason, the GATT provisions became legally binding on the Community. Although the Community had not existed when GATT was created in 1948 and never formally acceded to GATT, Article 307 ECT indicated the Member States' clear intention that the Community be bound by the GATT obligations.<sup>412</sup>

The ECJ reconfirmed its *International Fruit* ruling in the *Nederlandse Spoorwegen* case. The Court held that, as regards the fulfilment of commitments under GATT, the Community has replaced the Member States and that it has succeeded to the rights and obligations of the Member States.<sup>413</sup> Accordingly the ECJ regarded GATT 1947 as part of Community law, which is a legally binding agreement for the Community itself.<sup>414</sup>

In both *SIOT* and *SPI/SIAMI*, the ECJ considered that any difference in the interpretation and application of provisions binding the Community would jeopardise the unity of commercial policy and create distortions in trade within the Community.<sup>415</sup>

The ECJ's judgements concerning the incorporation of GATT 1947 into the Community legal system make it clear that, in the Court's view, GATT 1947 was binding on the Community as such and that it actually did form an integral part of Community law. The fact that the Court did not explicitly mention this in its judgement

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<sup>412</sup> Case 21/72 E.C.R. (1972) 1219, 1226 (paragraph 7); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61981J0021; 21.02.2001).

<sup>413</sup> Case 38/75 E.C.R. (1975) 1439, 1450 (paragraph 16); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61975J0038; 21.02.2001).

<sup>414</sup> Case 38/75 E.C.R. (1975) 1439, 1450 (paragraph 21); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61975J0038; 21.02.2001).

<sup>415</sup> Joined Cases 267-269/81 E.C.R. (1983) 801, 828 (paragraph 14); [www.curia.eu.int/common/recdoc/indexaz/en/c1htm](http://www.curia.eu.int/common/recdoc/indexaz/en/c1htm) (document no. 61981J0267; 21.02.2001).



did not have any meaning on the Court's attitude towards GATT.<sup>416</sup> After its first judgement in 1972 the Court reconfirmed its monist view of the relationship between GATT law and Community law in the cases that followed.<sup>417</sup>

Although the direct application of GATT 1994 is technically different from the direct application of GATT 1947, there is no real difference in practice. GATT 1994 is one of the integral parts of the WTO Agreement.<sup>418</sup> In contrast to GATT 1947, GATT 1994 was concluded by the Council under Article 300 ECT and therefore is binding on the Community and on the Member States. Consequently, its provision forms an integral part of the Community legal system without the need for transformation.

#### 4.1.3 The GATT / WTO provisions in South African law

With regard to the GATT/WTO provisions in South African law, South Africa was one of twenty-three founder members of GATT and has participated in the various rounds of negotiations. South Africa, however, was not a typical member of GATT. Its apartheid policies resulted in political and economic isolation. By the early 90s, South Africa was left with a complex, unstable, unpredictable system of protection, which bore no relationship to a programme of industrial development, let alone export-oriented industrialization.<sup>419</sup>

In the Uruguay Round, South Africa came under pressure from its major trading partners to fall in line with the GATT philosophy,<sup>420</sup> and to make a substantial move to open its markets. Although the Uruguay Round was signed by the previous Government, its principles were embraced by the ANC-led Government elected in April 1994, which has confirmed South Africa's commitment to liberalization. Thus

<sup>416</sup> Hilpold *Die EU im GATT/WTO System* (1999) 189.

<sup>417</sup> Kuilwijk *The ECJ and the GATT Dilemma* (1996) 101.

<sup>418</sup> Kuilwijk *The ECJ and the GATT Dilemma* (1996) 102.

<sup>419</sup> Hirsch *South Africa and the GATT* (1993) 1-2.

<sup>420</sup> Referring to Hirsch *South Africa and the GATT* (1993) 2, the requirements of the Uruguay Round of all GATT members can be summarised as follows: 1. A 33% average cut in all industrial tariffs. Both industrial and agricultural tariff cuts are to be phased into equal annual cuts over five years; 2. A 36% average cut in all agricultural tariffs, and the diminution of domestic supports and export subsidies, and guarantees of minimum levels of market access for agricultural products; 3. Agreement to a series of compulsory codes on export subsidies, trade-related investment measures (TRIMs), and other issues; 4. A commitment to a longer-term programme of liberalizing barriers to the trade of services; 5. An agreement to bring textiles and clothing into the GATT instead of segregating them in a Multifibre Agreement.



South Africa had redressed its international economic relations and had again become part of the international trading community.<sup>421</sup>

In December 1994, South Africa became a member of the WTO and a party to all the multilateral agreements concluded in the Uruguay Round of trade negotiations according to the rules of the 1993 Constitution. The procedure for the conclusion of treaties<sup>422</sup> in South Africa has changed radically under the 1993 Constitution. Previously a treaty entered into by the executive had no effect domestically, unless it was incorporated into South African law by an Act of Parliament. Under the 1993 Constitution the President is authorized to negotiate and sign international agreements.<sup>423</sup> The Parliament, comprising the National Assembly and the Senate,<sup>424</sup> is empowered to agree to the ratification<sup>425</sup> of an international agreement signed by the President, or to the accession<sup>426</sup> to such an international agreement.<sup>427</sup> Furthermore section 231 (3) of the 1993 Constitution stipulates that an international agreement in principle binds the Republic only after Parliament agrees to the ratification of or accession to an international agreement. This international agreement shall form part of the law of the Republic, provided Parliament expressly so provides and such agreement is not inconsistent with this Constitution.

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<sup>421</sup> Blumberg *Trade regulation in South Africa* (1998) 1; DTI *South Africa and its relationship with the General Agreement on Tariffs and Trade (GATT) and the newly established World Trade Organization* (1995) 9.

<sup>422</sup> The Constitution uses the term "international agreement" instead of the more commonly used term "treaty", but "international agreement" is to be construed as "treaty" within the meaning of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, which together define a treaty as an international agreement between states or between states and international organizations in written form and governed by international law whatever its particular designation. See Dugard *International Law - A South African Perspective* (1994) 342.

<sup>423</sup> Section 82 (1) (i) of the 1993 Constitution.

<sup>424</sup> Section 36 of the 1993 Constitution.

<sup>425</sup> The word "ratification" in section 231 of the 1993 Constitution has two meanings. First, it refers to the international process in terms of which a treaty requiring ratification in addition to a signature to bring it into force on the international plane is ratified or confirmed by the necessary state authority, i.e. Parliament. This may be called *international ratification*. Secondly, it refers to the international procedure by which Parliament approves the treaty and thereby incorporates it into municipal law. This may be called *constitutional ratification*. The act of ratification therefore serves the dual purpose of confirming South Africa's consent to be bound on the international plane and of incorporating the treaty into municipal law. See Dugard *International Law - A South African Perspective* (1994) 343.

<sup>426</sup> A state may become a party to an international agreement in whose negotiation it did not participate, and which it did not sign, by means of *accession*, provided that the original parties accept that such states may accede to the treaty. Multilateral law-making treaties that seek to achieve a large measure of universality generally include an accession clause. Article XII of the Marrakesh Agreement establishing the WTO provides for the membership of a state by accession. See Dugard *International Law - A South African Perspective* (1994) 267.

<sup>427</sup> Section 231 (2) of the 1993 Constitution.



On 2 December 1994, South Africa deposited a signed instrument of accession to the Agreement establishing the WTO with the Secretariat of the GATT.<sup>428</sup> It thereby became a member of the WTO and a party to all the multilateral agreements concluded in the Uruguay Round of trade negotiations.<sup>429</sup> On 6 April 1995, the South African Parliament approved the accession, subsequent to recommendations from both houses of Parliament,<sup>430</sup> in accordance with the Interim Constitution of South Africa of 1993.<sup>431</sup> The South African Parliament did not declare that the Uruguay Round Agreements form part of the domestic law of South Africa, though, and an act of transformation is therefore needed for GATT 1994 to operate within the domestic legal system.<sup>432</sup> The GATT/WTO provisions, however, are binding on South Africa.<sup>433</sup> The TDCA between the EU and South Africa therefore needs to take account of these rules, in order to ensure compatibility with the GATT/WTO provisions.<sup>434</sup>

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<sup>428</sup> DTI *Instrument Of Acceptance* (02 December 1994).

<sup>429</sup> Interview with Rudolf Brits, Deputy Director: Trade Negotiations Unit, International Trade and Economic Development Division at the DTI of the RSA (04 June 2001): South Africa as a founding member of GATT and the WTO became a member of the WTO pursuant to Article XI of the Marrakesh Agreement establishing the WTO. Countries that are not original founding Members accede to the WTO pursuant to Article XII of the Marrakesh Agreement establishing the WTO.

<sup>430</sup> Parliament of the RSA *Announcements, Tablings and Committee Reports-No 21/1995* (23 March 1995) 96; Parliament of the RSA *Announcements, Tablings and Committee Reports-No 24/1995* (28 March 1995) 116.

<sup>431</sup> RSA *Minutes Of Proceedings Of National Assembly - No 18/1995* (06 April 1995) 147-148; RSA *Minutes Of Proceedings Of Senate - No 16/1995* (06 April 1995) 149.

<sup>432</sup> GATT was implemented through the Customs and Excise Act and the Board on Tariffs and Trade. See the following documents for the implementation of GATT into South African law: WTO-Committee on Antidumping Practices and Committee on Subsidies and Countervailing Measures *Notification of laws and regulations under Articles 18.5 and 32.6 of the Agreements - South Africa, Doc. No. G/ADP/N/1/ZAF/1 and G/SCM/N/1/ZAF/1 - 95/3998* (8 December 1995); WTO-Trade Policy Review Body *Trade Policy Review Republic of South Africa, Report by the Secretariat, Doc. No. WT/TPR/S/34 - 98/1343* (6 April 1998); WTO Committee on Customs Valuation *Notifications under Article 22.2 of the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994-South Africa, Doc. No. G/VAL/N1/ZAF - 96/3422* (30 August 1996).

<sup>433</sup> DTI *South Africa and its relationship with GATT and the WTO* (1995) 9.

<sup>434</sup> Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 10; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).



## 4.2 Compatibility of the TDCA with the WTO law

A Dispute Settlement Understanding was established within the GATT provisions. This new WTO Dispute Settlement Understanding is a unified system for all parts of the GATT/WTO system, including the new subjects of services and intellectual property,<sup>435</sup> and is likely to become the most frequently applied multilateral system for the legal settlement of disputes among governments.<sup>436</sup> According to Article II (2) of the WTO Agreement, the "Understanding on Rules and Procedures Governing the Settlement of Disputes" in Annex 2 is an "integral part of this Agreement, binding on all Members".<sup>437</sup>

For this reason the creation of the WTO had serious implications for the trade agreement between the EU and South Africa: every member of the WTO could counter any perceived negative impact of the agreement on their economies,<sup>438</sup> if it could be proved that the Trade, Development and Cooperation Agreement between the EU and South Africa was incompatible with the rules of the WTO.

### 4.2.1 The Most-Favoured-Nation Obligation

As members of the WTO, the EU and South Africa had to take account of the Most-Favoured-Nation obligation in their agreement. The Most-Favoured-Nation (MFN) clause embodied in Article 1 GATT was the cornerstone of the GATT 1947 system, and equally is the cornerstone of the new WTO multilateral trading system.<sup>439</sup> This article obliges each WTO member to extend most-favoured-nation treatment to all other states that are party to the agreement. Despite some confusion over the phrase "most favoured" - which seems to imply specially favourable treatment - MFN is synonymous with non-discrimination and equal access to the markets of all WTO members.<sup>440</sup> The concept of reciprocity is likewise associated with the MFN principle

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<sup>435</sup> Jackson *The World Trading System* (1998) 124.

<sup>436</sup> Petersmann *The GATT/WTO Dispute Settlement System* (1997) XV.

<sup>437</sup> The Dispute Settlement Understanding is reproduced in Annex D to Petersmann *The GATT/WTO Dispute Settlement System* (1997) 291-318.

<sup>438</sup> WTO *Training Package* (1999) section A, slide 1

<sup>439</sup> WTO *Training Package* (1999) section A, slide 1; Jackson *The World Trading System* (1998) 157.

<sup>440</sup> WTO *WTO - Trading into the future* (1998) 5; Jackson et al. *Legal problems of international economic relations* (1995) 448; Thomas-Development Bank Southern Africa, *The Lomé trade regime*



and forms an integral part of the concept of non-discrimination.<sup>441</sup> Although not defined, it is clearly stated in Article 28 bis GATT that negotiations on tariff reductions should be “on a reciprocal and a mutually advantageous basis.”

As shown in Chapter three, the Trade, Development and Cooperation Agreement between the EU and South Africa grants preferential access to each other's markets.<sup>442</sup> If the MFN obligation was strictly followed, the GATT provisions would be violated by the EU and South Africa because of not granting preferential access to their markets to other Member States of the WTO. Thus this could cause the WTO to authorize a responding action under the dispute settlement rules.

The WTO framework, however, provides exceptions to the MFN obligation. These are:<sup>443</sup>

- Part IV of the GATT
- Differentiation for Developing countries (such as the Enabling Clause)
- Waiver of the GATT/WTO obligations
- Regional Trade Arrangements under Article XXIV GATT.

The extent to which these exceptions apply to the TDCA needs to be determined here.

#### 4.2.1.1 Part IV of the GATT

In November 1964, a fundamental reform of the GATT legal framework occurred with the adoption of Part IV of the GATT, entitled “Trade and Development”, by the contracting parties. It became effective in June 1966 and provides for special measures intended to promote the trade and development of developing contracting

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and the World Trade Organisation (1999) 5; Jackson *The World Trading System* (1998) 157: It stands for an obligation to treat activities of a particular foreign country or its citizens at least as favourably as it treats the activities of any other country. For example: if nation A has granted MFN treatment to B, and then grants a low tariff to C on imports from C to A, nation A is obliged to accord the same low tariff treatment also to B and its citizens.

<sup>441</sup> WTO *WTO - Trading into the future* (1998) 5; Thomas “Lomé and the WTO” *IGD Occasional Paper No 21* (1999) 5; Jackson *The World Trading System* (1998) 157-158.

<sup>442</sup> See Chapter 3.1.2.1.

<sup>443</sup> WTO *WTO - Trading into the future* (1998) 5-6; WTO *Training package* (1999) section A, slide 4.



parties.<sup>444</sup> Of special importance in Part IV is Article XXXVI (8) GATT, under which developing countries are relieved of the commitment of reciprocity in concessions. This means that the developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the imports from developing countries.<sup>445</sup>

An explanatory note to paragraph 8 states that developing countries should not have to make contributions which are inconsistent with their individual development, financial and trade needs.<sup>446</sup> Part IV of GATT and this explanatory note in favour of developing countries obviously entail preferences that would otherwise violate the MFN obligation.

It is doubtful whether Part IV of GATT for developing countries also applies to South Africa. As shown above,<sup>447</sup> South Africa was officially classified by the WTO as a developed lower middle income country,<sup>448</sup> and though this classification is questionable, its economy, in certain respects, more closely resembles that of a "developed" than a "developing" country.<sup>449</sup>

Therefore a deviation from the MFN obligation in granting non-reciprocal trade preferences to South Africa could not be justified with reference to Part IV GATT. Such an exception would be discriminatory against other countries with the same status as South Africa that do not receive the same preferences. Therefore Part IV of GATT does not apply to the TDCA.

#### 4.2.1.2 Differentiation

For the EU and South Africa, a second possibility to justify their deviation from the MFN obligation under GATT provisions is the so-called Enabling Clause.

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<sup>444</sup> WTO *Regionalism and the world trading system* (1995) 7.

<sup>445</sup> Thomas "Lomé and the WTO" *IGD Occasional Paper No 21* (1999) 5.

<sup>446</sup> *Ibid.*

<sup>447</sup> See Chapter 2.2.4.1.

<sup>448</sup> Eisenberg "SA, Countertrade and GATT" *Stell LR Vol.4 No 2* (1993) 143-144; See Chapter

<sup>449</sup> See Chapter 2.2.4; EU COM "South Africa" *The Courier No 164* (1997) 3; Blumberg/Wentzel "Trade relations with Southern Africa" *DBSA Paper No 29* (1994) 7.



The Enabling Clause is made up from the provisions of the "Agreement on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries".<sup>450</sup> Through this clause, a permanent legal basis was created for preferences in favour of developing countries or among them, making them an integral part of the GATT system. Paragraph 1 of the Enabling Clause provides that "notwithstanding the provisions of Article 1 GATT, contracting parties may accord differential and more favourable treatment to developing countries, without according such treatment to other contracting parties."<sup>451</sup> The rationale behind this is that equal treatment for states that are unequal would be unfair.<sup>452</sup> Furthermore, Paragraph 2 (a) of the clause authorizes preferential tariff treatment accorded by developed, contracting parties to products originating in developing countries in accordance with the GSP.<sup>453</sup> Paragraph 2(c) of the Enabling Clause states that the developing countries may establish regional or global preferential arrangements for the mutual reduction or elimination of tariffs and, in accordance with criteria and conditions that may be prescribed by the WTO members, for the mutual reduction or elimination of non-tariff measures. In terms of paragraph 3 of the clause, differential treatment is designed to promote the trade of developing countries without raising barriers to the trade of other member countries.<sup>454</sup>

The Enabling Clause has been added to GATT principally to care for the needs of developing countries. Nevertheless, it does not define developing country status, nor does it specify which countries qualify for such preferences. Under GATT practice, the system of self-selection applies. This means that it is left to the countries to self-declare their status, and individual WTO Members can decide whether to treat a particular trading partner as a developing country.<sup>455</sup> Accordingly, it still has to be determined which countries fall within the category of eligible states.<sup>456</sup>

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<sup>450</sup> Jackson *The World Trading System* (1998) 164; the agreement was adopted by the GATT contracting parties during conclusion of the Tokyo Round in 1979, but the status of the "Enabling Clause" is not entirely clear.

<sup>451</sup> WTO *Training Package* (1999) section A slide 13; Thomas "Lomé and the WTO" *IGD Occasional Paper No 21* (1999) 6.

<sup>452</sup> Graumans "SADC-EU Cooperation" *FGD Occasional Paper No 11* (1997) 28.

<sup>453</sup> Under the GSP an industrialized country can offer a lower duty to a developing nation and the other GATT members can refrain from invoking their MFN right to the same reduced tariff.

<sup>454</sup> Thomas "Lomé and the WTO" *IGD Occasional Paper No 21* (1999) 6.

<sup>455</sup> Hoekman / Kostecki *The political economy of the world trading system* (1995) 238.

<sup>456</sup> Thomas "Lomé and the WTO" *IGD Occasional Paper No 21* (1999) 6.



As a basis for dealing with South Africa the problem with the Enabling Clause is again South Africa's status as a developed or developing country. Since its status as a developing country is controversial, the application of the Enabling Clause to the TDCA is questionable. Moreover, the Enabling Clause also requires uniformity of treatment for all developing countries. Therefore any improved access of South Africa to the European markets would have to generally apply to other states. This would lead to such an increase of imports to the European market that it would be economically unreasonable. Thus the Enabling Clause can not justify the deviation within the EU and South Africa from the MFN obligation.

#### 4.2.1.3 Waiver of the WTO/GATT obligations

Another possibility for exemption from the obligations of GATT would have been to request a waiver, which would have enabled the EU and South Africa to discriminate against other Member States.<sup>457</sup>

Under GATT 1947, Article XXV (5) GATT was a legal basis for the exemption of the Lomé Convention from Article 1 GATT. It sets out the condition that a two-thirds majority must approve the decision for a waiver.

Under the WTO, disciplines on waivers were tightened and are now dealt with in Article IX WTO (which was not in force when the waiver for the Lomé Convention was obtained) and the "Understanding in Respect of Waivers and Obligations under the GATT 1994".

Any waiver in effect at the entry into force of the WTO was agreed to expire by January 1997, unless extended by the WTO Ministerial Conference by a three-quarters majority.<sup>458</sup> This compares with the two-thirds requirement under GATT 1947. Waivers under the WTO must have an expiry date, which was not required under GATT 1947, and must be reviewed annually to ascertain if the "exceptional circumstances" requiring a waiver continue to exist.<sup>459</sup>

Hence, under the WTO regime, these changes substantially strengthened the discipline over the use of waivers. Taking into consideration the difficulties in

<sup>457</sup> Jackson *The World Trading System* (1998) 164.

<sup>458</sup> Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 10; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).

<sup>459</sup> Hoekman/Kostecki *The political economy of the world trading system* (1995) 167.



obtaining a waiver and the possible impacts of the TDCA on neighbouring African and European States, it is doubtful that the EU and South Africa could have obtained the required majority.<sup>460</sup> WTO members who could be adversely affected by such a waiver would probably have voted against it. A waiver therefore does not offer the EU and South Africa a possibility to be excused from the GATT/WTO obligations.

#### 4.2.1.4 Regional trade arrangements under Article XXIV GATT

Regional trade arrangements provide the third exception to MFN treatment as defined by Article 1 of GATT 1994. The WTO regime provides three approaches to establish a regional trade arrangement.<sup>461</sup> Article XXIV GATT provides an approach that is more suited for trade arrangements among developed countries and among advanced developing countries and it provides for the examination of regional trade arrangements by WTO members. This examination serves two purposes: to ensure the transparency of regional trade arrangements and to evaluate whether the agreement concerned is consistent with WTO rules.<sup>462</sup> In this case it could justify a departure from the MFN obligation.

Article XXIV envisages three types of regional arrangements. These are customs unions, free trade areas and "interim agreements" leading to a customs union or a free trade area.<sup>463</sup> The rules of Article XXIV GATT aim to ensure that regional trade arrangements facilitate trade between the constituent territories, while minimizing any adverse effects on their trade with WTO members that are not parties to such agreements.<sup>464</sup> This means that members of a customs union and free trade areas

<sup>460</sup> Davies "Promoting regional Integration in Southern Africa" *African Security Review* (1996) 9. Davies further argues that South Africa would have had to present itself as a developed country making concessions to developing countries, in order to secure a waiver for a bilateral agreement from the WTO under Article XXV GATT. In Davies' opinion this completely contradicts the stance it is taking in negotiations with major trading blocs, where the advantages of it being seen as a developing country are apparent.

<sup>461</sup> These are: Article XXIV GATT, Paragraph 4 (a) of the Enabling Clause and Part IV GATT, Article V GATS.

<sup>462</sup> WTO *Article XXIV of GATT 1994 (1)* at [www.wto.org/english/thewto\\_e/whatis/eol/e/wto08/wto8\\_56.htm](http://www.wto.org/english/thewto_e/whatis/eol/e/wto08/wto8_56.htm) (21.02.2001)

<sup>463</sup> Jackson *The World Trading System* (1998) 165; [www.wto.org/english/thewto\\_e/whatis/eol/e/wto08/wto8\\_56.htm](http://www.wto.org/english/thewto_e/whatis/eol/e/wto08/wto8_56.htm) (21.02.2001).

<sup>464</sup> [www.wto.org/english/thewto\\_e/whatis/eol/e/wto08/wto8\\_56.htm](http://www.wto.org/english/thewto_e/whatis/eol/e/wto08/wto8_56.htm) (21.02.2001); Jackson *The WTO – Constitution and Jurisprudence* (1998) 54 and 56, criticizes the fact that Article XXIV GATT is not adequate for the developing international economic practices today and gives examples of it. In his view Article XXIV GATT is an ambiguous and potentially broad exception, which appears to be



may reduce their tariffs among each other without extending such concessions to the remaining WTO members.

#### 4.2.1.4.1 Requirements of a Free Trade Area and a Customs Union

In order to invoke the rights set out above, the trade group concerned must satisfy the technical requirements, either of a free trade area or a customs union.

A free trade area (defined in Article XXIV, paragraph 8(b)) is an area formed by reciprocal multilateral agreements whereby two or more nations agree to limit or eliminate import tariffs and duties between them. Each individual country within the free trade area, however, continues to charge its regular duties on products coming from outside the association.<sup>465</sup>

A customs union (defined in Article XXIV, paragraph 8(a)) is an association of nations with duty-free treatment for imports from members and a common level of external tariffs for imports from non-members. In a customs union the members are obliged to replace their own individual duties with a uniform tariff applicable to the entire region.<sup>466</sup>

As already stated above,<sup>467</sup> Article 5 TDCA stipulates that the EU and South Africa agreed to establish a free trade area and not a common external tariff, after a transitional period. Consequently, their agreement can be described as an "interim agreement" leading to a free trade area.

If both the EU and South Africa satisfy all the technical requirements of an interim agreement leading to a free trade area, a deviation from the MFN obligations would be justified.

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inadequate to prevent potential abuses; Hoekman/Kostecki *The political economy of the world trading system* (1995) 218-219. The authors mention Article XXIV as a loophole and state that GATT's experience in testing FTA's against Article XXIV GATT has not been very encouraging. In their opinion various aspects of the rules and of the application of GATT have proved unsatisfactory.

<sup>465</sup> [www.wto.org/english/thewto\\_e/whatis/eol/e/wto08/wto8\\_56.htm](http://www.wto.org/english/thewto_e/whatis/eol/e/wto08/wto8_56.htm) (21.02.2001); Jackson et al. *Legal problems of international economic relations* (1995) 471; Thomas "Lomé and the WTO" *IGD Occasional Paper No 21* (1999) 9.

<sup>466</sup> [www.wto.org/english/thewto\\_e/whatis/eol/e/wto08/wto8\\_56.htm](http://www.wto.org/english/thewto_e/whatis/eol/e/wto08/wto8_56.htm) (21.02.2001); Jackson et al. *Legal problems of international economic relations* (1995) 471; Thomas "Lomé and the WTO" *IGD Occasional Paper No 21* (1999) 9.

<sup>467</sup> See Chapter 3.1.2.



#### 4.2.1.4.1.1 "Substantially all trade"

Although Article XXIV GATT stipulates that a free trade area must be reciprocal in nature, it does not prevent asymmetry from being built into the relationship while it is still an "interim agreement", provided that a plan and a schedule are filed with the WTO.<sup>468</sup> Once a fully-fledged Article XXIV GATT free trade area has been established, it can no longer be asymmetrical and it has to be fully reciprocal.<sup>469</sup>

However, although reciprocity must be granted in full, the MFN departures are allowed for a free trade area that is defined to require liberalization on "substantially all trade" involved.<sup>470</sup> The matter concerning the stage at which trade barriers are eliminated on "substantially all trade", however, has never been settled.<sup>471</sup> No accepted definition exists of the percentage of trade to be covered by a WTO-consistent agreement - the quantitative criteria - nor common criteria against which the exclusion of a particular sector from the agreement could be assessed - the qualitative criteria.<sup>472</sup>

Concerning the qualitative criteria, opinions vary on whether a whole sector, like the agricultural sector, could be excluded from an agreement. At present, an exclusion of a major sector is widely unacceptable.<sup>473</sup> Concerning the quantitative criteria, there is a possible range from 51% to 99%. Extreme cases of 51% are widely found to be unacceptable<sup>474</sup> and the European Union once urged 80% of all trade as a benchmark.<sup>475</sup> The outcome of in-depth discussions on this issue is that this rule should also be qualitatively understood: no major sector of economic activity is allowed to be excluded completely from a free trade agreement.<sup>476</sup>

<sup>468</sup> [www.wto.org/english/thewto\\_e/whatis/eol/e/wto08/wto8\\_56.htm](http://www.wto.org/english/thewto_e/whatis/eol/e/wto08/wto8_56.htm) (21.02.2001); Thomas "Lomé and the WTO" *IGD Occasional Paper No 21* (1999) 8; see also Article XXIV (5c) GATT.

<sup>469</sup> Thomas "Lomé and the WTO" *IGD Occasional Paper No 21* 1999) 8.

<sup>470</sup> Jackson *The World Trading System* (1998) 166; Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 10; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).

<sup>471</sup> Jackson et al. *Legal problems of international economic relations* (1995) 475.

<sup>472</sup> WTO *Article XXIV of GATT 1994* (2) at [www.wto.org/english/thewto\\_e/whatis/eol/e/wto08/wto8\\_57.htm](http://www.wto.org/english/thewto_e/whatis/eol/e/wto08/wto8_57.htm) (21.02.2001).

<sup>473</sup> Hilpold *Die EU im GATT/WTO System* (1999) 21; [www.wto.org/english/thewto\\_e/whatis/eol/e/wto08/wto8\\_57.htm](http://www.wto.org/english/thewto_e/whatis/eol/e/wto08/wto8_57.htm) (21.02.2001).

<sup>474</sup> Hilpold *Die EU im GATT/WTO System* (1999) 21.

<sup>475</sup> Jackson et al. *Legal problems of international economic relations* (1995) 475.

<sup>476</sup> WTO *Guide to the Uruguay Round Agreements* (1999) 44; Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 269; [www.wto.org/english/thewto\\_e/whatis/eol/e/wto08/wto8\\_57.htm](http://www.wto.org/english/thewto_e/whatis/eol/e/wto08/wto8_57.htm) (21.02.2001).



Therefore the percentage of trade covered by the agreement is only an indicator and not the only factor to be taken into account. As long as no whole major sector is excluded from the agreement and the exceptions do not present a large percentage of the bilateral trade, it is possible for the EU and South Africa to maintain trade restrictions on a number of products. Furthermore, Article XXIV (5b) GATT lays down the condition that the duties and other regulations of commerce imposed on the trade of third parties at the formation of the free trade area shall not be higher or more restrictive than those existing prior to its formation.<sup>477</sup>

With regard to the required liberalization on "substantially all trade", the TDCA between the EU and South Africa provides, in Article 5 TDCA, that 94,9% of EU imports from South Africa will enter the market free of duty by the end of the ten-year period.<sup>478</sup> The respective figures on the South African side are twelve years and 86,3%.<sup>479</sup> Thus, the free trade agreement provides for free trade in about 90% of all products after the transitional period and no sector is entirely excluded.<sup>480</sup> Furthermore, the TDCA also includes a precise plan and schedule for the tariff reduction.<sup>481</sup> For this reason, the TDCA fulfils the requirement of being reciprocal for "substantially all trade" between the EU and South Africa.<sup>482</sup>

#### 4.2.1.4.1.2 "Within a reasonable length of time"

Since a free trade area takes a long time to be established, interim agreements are necessary to avoid the economic disturbance caused by a rapid move to free trade

<sup>477</sup> [www.wto.org/english/thewto\\_e/whatis/eol/e/wto08/wto8\\_56.htm](http://www.wto.org/english/thewto_e/whatis/eol/e/wto08/wto8_56.htm) (21.02.2001).

<sup>478</sup> Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 4-5; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>479</sup> See Chapter 3.1.2.1 ; Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 26; Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 5; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>480</sup> Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 5; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>481</sup> See Chapter 3.1.2.

<sup>482</sup> Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 5; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).



among the members. To prevent these agreements from being used as a pretext for introducing discriminatory preferences, they are required, according to Article XXIV (5c) GATT, to include "a plan and a schedule" for the formation of the free trade area within "a reasonable length of time."<sup>483</sup>

The notion of a "reasonable length of time" has proven so vague as to defy meaningful enforcement.<sup>484</sup> One agreement provided for a transitional period of twenty-two years, plus ten years for certain products.<sup>485</sup> Another agreement provided for a preparatory stage of five years, and a transitional stage not exceeding twelve years.<sup>486</sup> The Uruguay Round Understanding on Article XXIV<sup>487</sup> sets the period for establishment at ten years. In cases where the parties to an agreement believe that ten years would be insufficient, they are to provide a full explanation of the need for a longer period to the Council for Trade in Goods. The ten-year period can be extended, given sufficient justification.<sup>488</sup>

As already mentioned, the TDCA provides for a ten-year period on the EU side and for a twelve-year period on the South African side to eliminate the tariff barriers on "substantially all trade" between them.<sup>489</sup> This slightly longer period of time for South Africa is explained by the unique economic situation of the country. Its domestic economy needs a longer period than the stronger European economy to adapt to the free trade area and this can therefore be fully justified.<sup>490</sup> The free trade area

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<sup>483</sup> Thomas "Lomé and the WTO" *IGD Occasional Paper No 21* (1999) 9; [www.wto.org/english/thewto\\_e/whatis\\_e/eol/e/wto08/wto8\\_56htm](http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto08/wto8_56htm) (21.02.2001); Graumans "The European Union - South Africa negotiations" *Netherlands Institute for Southern Africa Occasional Paper No 1* (1998) 10; [www.niza.nl/uk/publications/016/niza-papernol-1998.htm](http://www.niza.nl/uk/publications/016/niza-papernol-1998.htm) (09.03.2001).

<sup>484</sup> Hilpold *Die EU im GATT/WTO System* (1999) 22; Jackson *The World Trading System* (1998) 166.

<sup>485</sup> Association of Greece with the European Economic Community (1963); Jackson et al. *Legal problems of international economic relations* (1995) 472.

<sup>486</sup> Association of Turkey with the European Economic Community (1966); Jackson et al. *Legal problems of international economic relations* (1995) 472.

<sup>487</sup> Pescatore/Davey/Lowenfeld *Handbook of WTO/GATT Dispute Settlement* (1998) vol. 1, 99; Jackson *The World Trading System* (1999) 166: The Understanding on Article XXIV GATT was designed by the negotiators to address some of the problems of interpreting Article XXIV GATT. Although not changing the actual language of Article XXIV GATT, the Understanding sets forth certain interpretations and guidelines for handling some of the ambiguities in Article XXIV GATT.

<sup>488</sup> For the Understanding on Article XXIV GATT, see Pescatore et al. *Handbook of WTO/GATT* (1998) vol. 1, 99; WTO *Guide to the Uruguay Round Agreements* (1999) 45; Hoekman/Kostecki *The political economy of the world trading system* (1995) 220; [www.wto.org/english/thewto\\_e/whatis\\_e/eol/e/wto08/wto8\\_56htm](http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto08/wto8_56htm) (21.02.2001).

<sup>489</sup> See Chapter 3.1.2.1; Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 26.

<sup>490</sup> See Chapter 3.1.2.1; Pescatore et al. *Handbook of WTO/GATT* (1998) vol. 1, 100.



between the EU and South Africa is thus established according to Article XXIV (5c) GATT within a "reasonable length of time".

#### **4.2.1.4.1.3 Approval by the contracting parties of the WTO**

The free trade agreement between the EU and South Africa had to be approved by the WTO. The formal procedure for this approval is laid down in Article XXIV (7) GATT and in the Understanding of Article XXIV under the paragraphs 7 to 11.<sup>491</sup>

According to Article XXIV (7a) GATT, any contracting party intending to enter into a free trade area, or an interim agreement leading to the formation of such an area, has to promptly notify the contracting parties and to make available relevant information requested by WTO members, and may be subjected to the scrutiny of a working party to determine the consistency of the agreement with multilateral rules. Consequent to a working party's report on the consistency of an agreement, "recommendations" may be made by the Council "as they deem appropriate".<sup>492</sup>

According to Article XXIV (7b) GATT, the parties shall not maintain or put into force an agreement if they are not prepared to modify it in accordance with these recommendations.

In practice, however, matters have worked out differently. The procedure of Article XXIV (7) GATT was not always observed and a universal approval for an FTA was rarely achieved. Of the 70 Article XXIV-type arrangements notified from 1948 to 1990 - some of which provided very loose preferences as interim agreements and set no date for completion of the free trade area - only four were deemed by consensus to be compatible with Article XXIV GATT. Nevertheless no formal record of GATT "disapproval" of such arrangements exists.<sup>493</sup> Since most members of GATT are involved in some form of preferential trading arrangement, members have tended to

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<sup>491</sup> WTO *Article XXIV of GATT 1994* (3) at [www.wto.org/english/thewto\\_e/whatis\\_e/eol/e/wto08/wto8\\_58.htm](http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto08/wto8_58.htm) (21.02.2001); *Pescatore et al. Handbook of WTO/GATT* (1998) vol. 1, 100.

<sup>492</sup> [www.wto.org/english/thewto\\_e/whatis\\_e/eol/e/wto08/wto8\\_58.htm](http://www.wto.org/english/thewto_e/whatis_e/eol/e/wto08/wto8_58.htm) (21.02.2001).

<sup>493</sup> Jackson *The World Trading System* (1998) 166, giving a reference to the GATT analytical index; Jackson *The WTO – Constitution and Jurisprudence* (1998) 54; Blumberg/Wentzel "Trade relations with Southern Africa" *DBSA Paper No 29* (1994) 2.



refrain from forcefully criticising preferential trading arrangements involving other members of GATT.<sup>494</sup>

In the case of the TDCA, the EU and South Africa notified the TDCA on the 2<sup>nd</sup> of November 2000 and sought the necessary approval. The examination by the WTO has not started yet.<sup>495</sup>

#### 4.2.1.4.2 Conclusion

The TDCA between the EU and South Africa substantially liberalizes about 90% of the trade involved, as provided by Article XXIV GATT. The interim agreement leading to the formation of the free trade area includes a plan and a schedule for the formation of such an area within a "reasonable length of time" and the two contracting parties sought the necessary formal approval of the contracting parties of the WTO. Thus a deviation by the EU and South Africa from the MFN obligation seems to be justified under Article XXIV GATT only.<sup>496</sup>

However, since Article XXIV (4) GATT expressly refers to "constituent territories", one could interpret Article XXIV GATT to refer only to contiguous regions. Certainly, the drafters of the provision at the time had territories such as the Benelux countries in mind.<sup>497</sup> They did not envisage customs unions or free trade areas between two non-contiguous regions such as the EU and South Africa.<sup>498</sup>

This argument aside, Article XXIV has been widely criticised for setting out inadequate criteria for both customs unions and free trade areas. In Jackson's opinion, the language of Article XXIV GATT is not adequate for the developing international economic practices of today.<sup>499</sup> Take, for example, Paragraph 5 (the GATT exception allows an "interim agreement" - one that leads to a customs union or a free trade area within a reasonable time - to depart from MFN) which has opened a

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<sup>494</sup> Blumberg/Wentzel "Trade relations with Southern Africa" *DBSA paper No 29* (1994) 7.

<sup>495</sup> EU COM *Bilateral trade relations* at [www.europa.eu.int/comm/trade/bilateral/saf.htm](http://www.europa.eu.int/comm/trade/bilateral/saf.htm) (08.05.2001).

<sup>496</sup> Trade & Industry and Foreign Affairs Portfolio Committees, Economic Affairs Select Committee *SA-EU Trade, Development and Cooperation Agreement* (1999) 4; [www.southafricahouse.com/tradeeu-sa.htm](http://www.southafricahouse.com/tradeeu-sa.htm) (09.03.2001).

<sup>497</sup> Benelux: Belgium, Netherlands and Luxemburg.

<sup>498</sup> Thomas "Lomé and the WTO" *IGD Occasional Paper No 21* (1999) 9.

<sup>499</sup> Jackson *The WTO - Constitution and Jurisprudence* (1998) 56.



loophole of considerable size, because almost any type of preferential agreement can be claimed to fall within the exception for interim agreement, and the criterium of a "reasonable time" is exceedingly imprecise.<sup>500</sup> Hoekman and Kostecki further argue that the GATT experience in testing free trade areas and customs unions against Article XXIV GATT has not been very encouraging. From their point of view, this article has been abused by associations claiming to be party to Article XXIV GATT arrangements and has therefore not achieved its purpose of controlling such arrangements.<sup>501</sup>

The criteria for trade arrangements are certainly in need of sharper definition and the context of Article XXIV GATT needs to be expanded to deal with the realities of trade between non-contiguous regions. Nevertheless there is no standard model for a trade bloc in the international system and there are no standard models for customs unions or free trade arrangements.

Therefore the existing rules have to be applied and the EU and South Africa may well derogate from the MFN obligation and grant each other favourable trade relations.

#### **4.2.2 Disputes concerning regional interests**

However, one also has to bear in mind that the granting of favourable trade relations only between the EU and South Africa generates suspicion among neighbouring countries and other interested third parties that the FTA may have adverse effects on their trade and thus could lead to serious disputes concerning regional interests.

With regard to third countries, Article XXIV (4) GATT stipulates that it is the purpose of free trade areas to facilitate the trade between the constituent territories, but not to raise new barriers for third countries with respect to their trade with such territories. Furthermore, it is now established, as a result of the Uruguay Round, that the dispute settlement procedures of GATT 1994 may be invoked by any third party with respect to any matter arising under Article XXIV GATT, which relates to customs unions, free trade areas or interim agreements.<sup>502</sup> The WTO dispute settlement bodies certainly

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<sup>500</sup> Jackson *The World Trading System* (1998) 166.

<sup>501</sup> Hoekman/Kostecki *The political economy of the world trading system* (1998) 218-219.

<sup>502</sup> WTO *Guide to the Uruguay Round Agreements* (1999) 45.



have no jurisdiction to assess the overall WTO compatibility of any FTA,<sup>503</sup> but they can still examine any specific measure adopted by WTO members in the context of their free trade area.<sup>504</sup> For this reason, the EU and South Africa remain bound by all WTO obligations, irrespective of the dispute settlement provision in the TDCA.

With regard to the present case, it needs to be emphasized that all countries in the Southern African region have strong and longstanding trade relations with both the EU and South Africa, which is by far the main trading partner of the Southern African countries.<sup>505</sup> The BLNS countries are closely bound to South Africa as members of the Southern African Customs Union (SACU) and most of the Southern African countries have entered into formal trade relations with South Africa under the Southern African Development Community (SADC) Agreement.

Consequently, Southern African countries, especially, are afraid of negative impacts on their trade with either party of the TDCA. This fear in these countries raises the questions of in how far they could be affected by the EU-SA FTA and whether they, like any other third country, could institute WTO dispute settlement proceedings against the EU or South Africa.

#### **4.2.2.1 Southern African Customs Union**

The Southern African Customs Union (SACU) comprises South Africa and the BLNS countries: Botswana, Lesotho, Namibia and Swaziland. While its origins are in the unification of South Africa in 1910, the present SACU Agreement was concluded in 1969.<sup>506</sup>

The SACU trade framework provides for South African law and customs regulations to be the pivot around which SACU operates. Articles 2 and 3 of the SACU Agreement provide for free movement of goods between and among Member States. With regard to third countries, Article 10 of the SACU Agreement provides for the members of SACU to implement the South African tariff as a common external tariff.

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<sup>503</sup> This is the responsibility of the WTO Committee on Regional Trade Agreements.

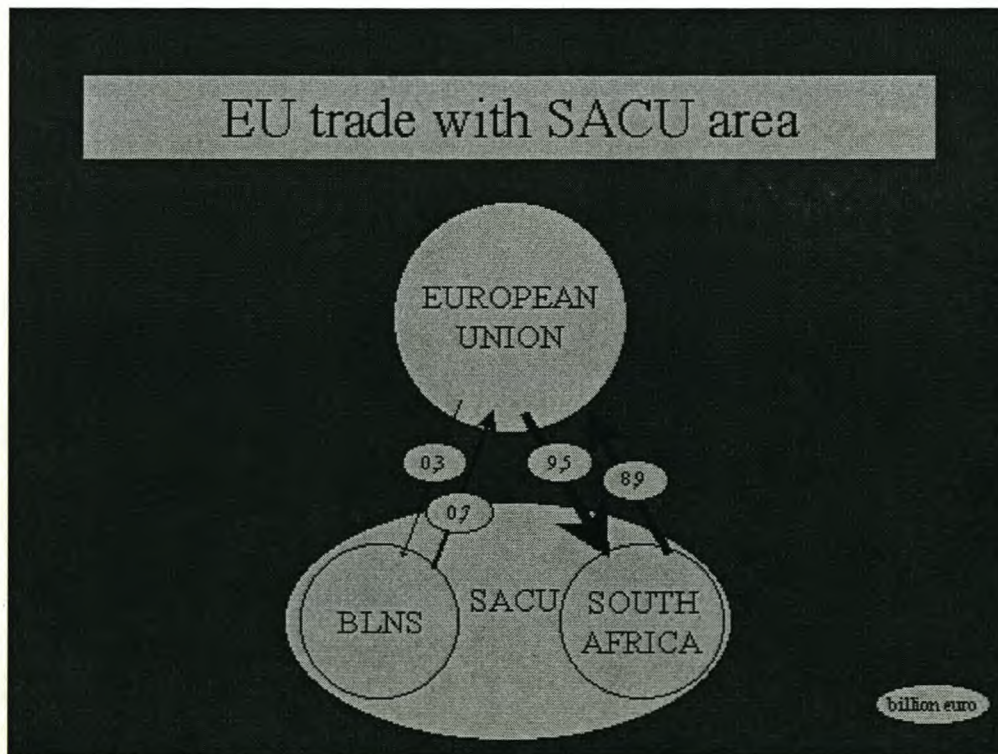
<sup>504</sup> Petersmann *The GATT/WTO Dispute Settlement System* (1997) 195.

<sup>505</sup> For possible implications of the free trade area agreement to the Southern African region, see Thomas "Lomé and the WTO" *IGD Occasional Paper No 21* (1999) 14-15.

<sup>506</sup> See the SACU Agreement of December 1969, published in the Government Gazette, vol. 54 No 1212; Graumans "Redefining relations between SA and the EU" *FGD Occasional Paper No 10* (1997) 6.



Thus the common external tariff of SACU is in fact determined by South Africa, which can promulgate and amend legislation, tariffs and customs regulations unilaterally for the whole of the customs union. South Africa's obligations in this respect are rather loosely structured and are far from mandatory, leaving the BLNS countries mainly dependent on the goodwill of the South African government.<sup>507</sup> All customs revenues collected at ports of entry, as well as excise duties and import surcharges collected by SACU members, are surrendered to a common revenue pool administered by the South African Reserve Bank. South Africa then distributes shares from the common revenue pool to the other four countries according to a revenue share formula (set out in Article 14 of the SACU Agreement) based on enhancement and stabilization factors. The importance of the customs union revenue pool for the BLNS countries becomes obvious when one considers the fact that the EU is currently accounting for 40% of the imports of the SACU,<sup>508</sup> and that more than 46% of Swaziland's national budget, more than 50% of Lesotho's budget, 17,1% of Botswana's budget and 24% of Namibia's derived from the customs revenue pool in the fiscal year of 1994/95.<sup>509</sup>



<sup>507</sup> Blumberg/Wentzel "Trade relations with Southern Africa" *DBSA Paper No 29* (1994) 3.

<sup>508</sup> Goodison "Marginalisation or Integration?" *IGD Occasional Paper No 22* (1999) 46.

<sup>509</sup> Bertelsmann-Scott "The EU, SA and the FTA" *SAYII* (2000) 269.



In the case of the TDCA between South Africa and the EU, this implies that all duty reductions agreed to in the FTA between the EU and South Africa also apply to the BLNS countries. The agreed tariff reductions within the TDCA between the EU and South Africa therefore involve a significant reduction in revenue for the BLNS countries,<sup>510</sup> because of their dependence on the common fund. This is likely to have serious budgetary implications for the BLNS countries.<sup>511</sup>

This far-reaching impact of a bilateral trade agreement raises the question whether the BLNS countries can institute any dispute settlement proceedings against the EU or South Africa, if the occasion arises. The answer depends, on the one hand, on the merits of such action and, on the other hand, on the status of the complaining state as a third party to the TDCA.

In the case of an intra-SACU dispute concerning a change in the common external tariff of SACU, this cannot be entertained by the WTO because the WTO's jurisdiction is limited to GATT and GATT-related disputes.<sup>512</sup> Article 19(1) of the SACU Agreement, however, provides that a change in the common external tariff that is due to a trade agreement with another state has to be approved by all SACU Members.<sup>513</sup> Accordingly, the TDCA between the EU and South Africa, which, in its provisions for a free trade area, contains concessions on the duties currently in force in the customs area, has to be approved by the BLNS countries.

However, there is no provision for any kind of sanctions in the case of a contravention of the SACU Agreement. The institutional framework, especially the provisions for the resolution of disputes that are set out and provided for in Article 20 of the SACU Agreement, is very weak. Compared to the dispute settlement system

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<sup>510</sup> According to a study of the Botswana Institute for Development Policy, the pool would be reduced by 31%. Botswana will be least affected and its total revenue will fall by 5.3%. Namibia will see its total revenue decline by 8.6%. Swaziland and Lesotho which are highly dependant on SACU revenue will be the most affected. Swaziland's total revenue will decrease by 13.9% while that of Lesotho will decrease by 12.9%. In monetary terms BLNS countries will suffer revenue declines of between R1.9 billion and R3.5 billion a year. See Mbekeani "Impact of the SA-EU TDCA on the BLNS" *IGD Occasional Paper No 24* (2000) 54-55.

<sup>511</sup> Mbekeani "Impact of the SA-EU TDCA on the BLNS" *IGD Occasional Paper No 24* (2000) 55.

<sup>512</sup> Blumberg & Kumar "Southern African Regional Organisations: Recommendations of an institutional nature on decision-making and dispute resolution" *DBSA Paper No 74* (1996) 20.

<sup>513</sup> See Appendix 1.



under the TDCA and the WTO,<sup>514</sup> Article 20 (1) of the SACU Agreement only provides for the establishment of a Customs Union Commission consisting of representatives of all the contracting parties, which meets once a year or at the request of a contracting party. According to Article 20 (2) of the SACU Agreement, this Commission then tries to elaborate a mutually agreeable solution, which is reported by the representatives to their respective governments for consideration of curative measures. Additionally, Article 20 (5) of the SACU Agreement provides for direct bi- or multilateral consultations in respect of any difficulties not affecting all the contracting parties. Considering the level of dependency of the BLNS countries on South Africa, it is very unlikely that they will veto the TDCA between South Africa and the EU. Thus the BLNS countries, in the case of an intra-SACU dispute, remain dependent on the provisions of the SACU Agreement, which leaves them to rely mainly on the goodwill of the South African government.

This feature of SACU has led to major criticism of the current SACU Agreement and is frequently described as lacking democracy in its operations.<sup>515</sup>

The EU could serve as an example for the democratization of decision-making within SACU. Although the fifteen Member States (for practical reasons) did not take part directly in the negotiations with South Africa, they were represented through the European Parliament and the Council and therefore could influence the decision-making process within the European Community. This gave them the right to defend their position on certain questions and did not leave them dependent on the goodwill of the Community. However, the Community, as a supra-national body, has the power to conclude an agreement. But SACU does not have such an institution. Thus the BLNS countries were not represented in the negotiations between the EU and South Africa and now practically have to "live" with the outcome of the negotiations. Therefore there is an urgent need for creating an institution within SACU and for investing it with the necessary powers to democratize decision-making within

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<sup>514</sup> See Chapter 3.1.3.7.

<sup>515</sup> McCarthy *Regional Integration – Part of the solution or Part of the Problem?* in: Ellis (ed) *Africa now: People, Policies & Institutions* (1994) 225; See same source for further reading on the possibility of regional integration in Southern Africa.



SACU.<sup>516</sup> This should eliminate the recurring criticism that the BLNS countries are marginalized when it comes to determining tariffs.<sup>517</sup>

BLNS countries, nevertheless, can not become part of the agreement by their consent to the TDCA. Instead, they are third parties to the treaty. If a situation should arise in which it could be established that the EU and/or South Africa have taken specific measures in violation of WTO rules, any WTO member state (including Botswana, Lesotho, Namibia and Swaziland) may therefore invoke the WTO dispute settlement mechanism, when necessary.

#### 4.2.2.2 Southern African Development Community

The other regional arrangement that South Africa is involved in is the Southern African Development Community (SADC).

The SADC was originally established as the Southern African Development Cooperation Conference (SADCC), in Lusaka, in 1980. It initially comprised ten countries in the region<sup>518</sup> and its aim was to oppose and lessen dependence on the apartheid regime. The SADC redefined its objectives in 1992 to develop a focus on economic integration in the region, which is to be given effect on the basis of the equal distribution of costs and benefits. South Africa joined the organization in August 1994 and has chaired the SADC since August 1996.<sup>519</sup>

In August 1996, at its annual heads of states meeting, the SADC adopted a trade protocol. Since intra-regional trade in the SADC is at a very low level (around 5% of total trade of SADC members), this SADC Trade Protocol was developed to liberalize intra-regional trade in goods and services within the region on the basis of fair, mutually equitable and beneficial trade arrangements, complemented by Protocols in

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<sup>516</sup> Maasdorp *Discussion of South Africa and SACU* in: Sisulu, Nkosi, Setai, Thomas (ed) *Reconstituting and Democratizing The Southern African Customs Union – Report of the workshop held in Gabarone, Botswana* (1994) 71; McCarthy *Discussion of South Africa and SACU* in: Sisulu, Nkosi, Setai, Thomas (ed) *Reconstituting and Democratizing The Southern African Customs Union – Report of the workshop held in Gabarone, Botswana* (1994) 75.

<sup>517</sup> Kumar *The Uruguay Round and the Southern African Customs Union* in: Sisulu, Nkosi, Setai, Thomas (ed) *Reconstituting and Democratizing The Southern African Customs Union – Report of the workshop held in Gabarone, Botswana* (1994) 52.

<sup>518</sup> Angola, Botswana, Malawi, Mozambique, Namibia, Swaziland, Tanzania, Zambia and Zimbabwe.

<sup>519</sup> SADC *History, Evolution and Current Status* at [www.sadc.int/english/About/background.htm](http://www.sadc.int/english/About/background.htm) (11.09.2001).



other areas. It aims to ensure efficient production within the SADC to reflect the current and dynamic comparative advantages of its members. Furthermore, the SADC's long-term objective is to enhance the economic development, diversification and industrialization of the region and to ultimately establish a fully integrated FTA within a period of eight years from its entry into force. The Trade Protocol entered into force on 25 January 2000 and was launched on 1 September 2000.<sup>520</sup> Given the pace at which the ratification process was proceeding in the subsequent months, the SADC FTA was not likely to be in place in the SADC before 2008. However, commendable progress could be made during the course of 2001. At an official meeting of the SADC Council of Ministers in Malawi, in August 2001, the chairperson of the SADC Council of Ministers, Mr Hipido Hamutenya, could finally announce that all Member States had ratified the SADC Trade Protocol and had deposited their instruments of implementation with the Secretariat.<sup>521</sup> Thus, the SADC region, to date, hopes to attain an FTA by 2008, which is expected to promote intra-regional trade.

However, one has to bear in mind that intra-regional trade is currently dominated by South Africa, accounting, according to 1995 and 1996 data, for 63% of total imports and 70% of total exports. SADC countries, excluding the BLNS, account for 5% of South Africa's total exports and 2% of its imports.<sup>522</sup> In view of South Africa's extraordinarily strong economic position, it does not need to be emphasized that the SADC states fear a negative impact from the preferential access of EU goods to the South African market. Since all SADC countries are highly dependent on exporting their goods to the South African market, they now, for example, are very concerned that the TDCA between the EU and South Africa could result in cheaper EU imports, which would force producers in the SADC region to improve their operation efficiency or to suffer losses in shares on the South African market.<sup>523</sup>

Furthermore, the SADC countries are concerned that South Africa will give priority to the trade relations with Europe over against its strategic and development relations

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<sup>520</sup> SADC *The SADC Free Trade Area* at [www.sadcreview.com](http://www.sadcreview.com) (11.09.2001); SADC *SADC Trade Protocol* at [www.sadc.int/mark0202.html](http://www.sadc.int/mark0202.html) (11.09.2001).

<sup>521</sup> SADC *Hon. Hamutenya's Council Speech 2001* at [www.sadc.int/english/WhatsNew/councilchairperson2001.htm](http://www.sadc.int/english/WhatsNew/councilchairperson2001.htm) (18.09.2001).

<sup>522</sup> Imani Development (International) Ltd. "Study on the impact of introducing reciprocity into the trade relations between the EU and the SADC region" *IGD Occasional Paper No 21* (1999) 53-54.

<sup>523</sup> Munetsi Madakufumba, Southern African Research and Development Centre "Discussion on the introduction of reciprocity in the trade relations between the EU and SADC" *IGD Occasional Paper No 21* (1999) 41.



with the rest of Southern Africa. This could complicate long-standing plans for the creation of an effective, stable regional economic grouping in Southern Africa.<sup>524</sup>

With regard to the data on South Africa's total import and export figures and the level of economic integration in the SADC region, it obviously is not unlikely that the EU-SA TDCA could have such negative effects on the region.

But in order to avoid such effects on the SADC countries, the Trade Protocol contains a provision that has considerable influence on the extent SADC countries could be affected by the SA-EU TDCA. Article 28 (2) of the Protocol lays down that no state can offer trade benefits to a third country without immediately extending such benefits to all other fellow countries in the SADC.<sup>525</sup> Thus, South Africa cannot negotiate higher tariffs with SADC countries than with the EU and will have to extend all trade preferences granted to the EU to its partners in the SADC as well, to avoid negative effects on them.

Should it, however, be the case that the EU-SA TDCA has negative implications for the SADC region, this does not automatically constitute a violation of WTO rules. Instead, these effects would be a consequence of the shift in comparative advantages legitimately resulting from a free trade agreement. Thus, the TDCA and its effects cannot successfully be challenged under the WTO dispute settlement procedure, unless it can be established that the EU and/or South Africa had taken specific measures, such as quantitative restrictions, that violate WTO rules. Should an occasion arise in which it could be established that the EU and/or South Africa had taken specific measures in violation of WTO rules, the SADC Member States, like any other third country, could institute WTO dispute settlement proceedings against the EU or South Africa.

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<sup>524</sup> Thomas "Lomé and the WTO" *IGD Occasional Paper No 21* (1999) p.15; Keet "The EU's proposed FTA" *Development Southern Africa* (1996) 560.

<sup>525</sup> SADC SADC Trade Protocol at [www.sadc.int/mark0202.html](http://www.sadc.int/mark0202.html) (11.09.01).



## 5. Intellectual Property Rights

Additional to the GATT/WTO provisions, intellectual property rights comprise another important field of WTO law that is touched on by the TDCA. Although the protection of intellectual property rights is guaranteed under the TDCA in Article 46 TDCA, the EU and South Africa had great difficulty with determining the correct use of intellectual property rights that involved them during the course of the negotiations. The use of the names "Port" and "Sherry" by local producers in South Africa and the EU led to such substantial disagreement between the parties that the conclusion of the overall agreement was at great risk on several occasions. This issue therefore deserves closer examination to determine the outcome of the complicated negotiations on the issue and to evaluate whether it might have an impact on future trade relations between the EU and other ACP countries.

### 5.1 Background

Within the WTO, intellectual property rights are defined as the rights given to persons with regard to the creations of their minds. These rights usually give the creator an exclusive right over the use of his creation for a certain period of time. Intellectual property rights are traditionally divided into two branches, namely "industrial property" and copyright and rights related to copyright. The main purpose of the protection of copyright and related rights is to encourage and reward creative work such as literary and artistic work, and uphold the rights of performers and broadcasting organizations. Industrial property can usefully be divided into two main areas. One area can be characterized as the protection of distinctive signs such as trademarks and geographical indications. Other types of industrial property are protected primarily to stimulate innovation, design and the creation of technology. In this category fall inventions, industrial designs and trade secrets.<sup>526</sup>

The TRIPs agreement forms an integral part of the WTO and therefore applies to all WTO members, developed and developing countries. It, however, is unique in the WTO context in that it imposes obligations upon governments to pursue specific,

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<sup>526</sup> WTO Training Package (1999) section E7-1; WTO WTO - Trading into the future (1998) 25; [www.wto.org/english/tratop\\_e/trips\\_etripfq\\_e.htm](http://www.wto.org/english/tratop_e/trips_etripfq_e.htm) (15.03.2001); Blakeney Trade Related Aspects Of Intellectual Property Rights (1996) 10.



similar policies. This is in stark contrast with the GATS and the GATT, which consist of agreements not to use specific policies. The TRIPs agreement is an example of harmonization of policies under GATT auspices.<sup>527</sup>

Looking at the issue from a global perspective, one realizes that the intellectual property rights - copyrights, trademarks, industrial designs, patents, etc. - are largely held in industrialized countries. Consequently, the developed countries traditionally are the proponents of intellectual property rights and more readily demand enforcement of those rights.<sup>528</sup> Developing countries, however, traditionally opposed this strongly, in particular arguing that they had much to lose and very little to gain from these rights, because the extension of intellectual property rights to the developing countries could mean that they would be paying for many technological advancements that they had been receiving without payment, with very little in return, because they did not think they had the capacity to develop new intellectual property.<sup>529</sup> They therefore argued that the enforcement of intellectual property rights could be detrimental to the welfare of their populations and the development process. There, however, were interest-groups such as industries using intellectual property in developing countries who favoured stronger protection of intellectual property. Thus the developing countries' acceptance of the TRIPs deal in the Uruguay Round stemmed from a mix of skepticism and a growing perception that intellectual property rights also had benefits in terms of allowing participation in knowledge-creating activities, providing consumers with access to new products, and giving industries better opportunities for obtaining cutting-edge technologies.<sup>530</sup> Briefly: because of the different levels of economic development, intellectual property rights play an increasingly important part in trade and an especially important role in trade relations between developed and developing countries.

To evaluate the extent to which the TDCA between the EU and South Africa was influenced by these rules and to see if this could serve as an example for further

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<sup>527</sup> [www.wto.org/english/tratop\\_e/trips\\_e/tripfq\\_e.htm](http://www.wto.org/english/tratop_e/trips_e/tripfq_e.htm) (15.03.2001); Hoekman/Kostecki *The political economy of the world trading system* (1998) 148; The anti-dumping rules are another example of harmonization of policies under GATT auspices.

<sup>528</sup> Jackson *The World Trading System* (1998) 311.

<sup>529</sup> Jackson *The World Trading System* (1998) 310.

<sup>530</sup> Hoekman/Kostecki *The political economy of the world trading system* (1998) 148-149.



negotiations with other ACP countries, the role of TRIPs in the TDCA, in general, and the issue of "Port" and "Sherry", in particular, therefore has to be analysed.

## **5.2 Agreement on Trade-related Intellectual Property Rights and the TDCA**

The protection of intellectual property rights is guaranteed under the TDCA in Article 46 TDCA. In terms of Article 46 (1) TDCA the EU and South Africa shall ensure adequate and effective protection of intellectual property rights in conformity with the highest international standards. The provision provides for the application of the WTO Agreement on TRIPs from 1 January 1996 and even calls for measures to improve it where appropriate.<sup>531</sup> Moreover, the efforts of the EU - as the more industrialized country - to protect its intellectual property rights are even reflected in the TDCA itself: in Article 46 (3) TDCA the EU confirms the importance attached to the obligations arising from certain international documents related to intellectual property rights. South African and European innovators therefore enjoy protection from other people using their intellectual property.

## **5.3 Port and Sherry in the context of TRIPs**

The use of the names "Port" and "Sherry" by local producers in South Africa and the EU led to substantial disagreement between the parties and several times placed the conclusion of the overall agreement at great risk. The dispute arose from the EU's demand that the terms be dropped by South Africa on both the domestic and the export markets. After four years of intensive negotiations the parties finally reached a compromise on the "Port" and "Sherry" issue.<sup>532</sup> As already shown in Chapter 3.1.9.2, South Africa agreed to phase out the terms on all export markets within five years, except in the case of SADC countries, where an eight-year phase-out period would apply. On the SACU markets, South Africa will retain the terms for the twelve-year transitional period. Beyond that period the new designations for these products which

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<sup>531</sup> [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001).

<sup>532</sup> See Chapter 2.11.



are to be used on the South African domestic market will be jointly agreed upon between the EU and South Africa.<sup>533</sup>

Although the parties reached this compromise and agreed on the duty-free access of wine to the European market, they still have not agreed on the complete Wine and Spirits Agreement, which, *inter alia*, includes the compromise package on Port and Sherry. It could therefore not be implemented into the overall agreement yet and still remains an issue between the parties.<sup>534</sup>

### 5.3.1 Article 23 TRIPs

To justify its position on the issue with regard to Port and Sherry, the EU refers to Article 23 TRIPs. This Article provides that interested parties must have the legal means to prevent the use of a "geographical indication" which identifies wines or spirits as originating in a particular geographical area when the wines and spirits do not in fact originate in that area. This applies even where the true origin of the goods is indicated on the product or the geographical indication is used in translation or accompanied by expressions such as "kind", "type", "style", "imitation", or the like.<sup>535</sup>

Article 23 TRIPs accordingly prohibits any false use of a geographical indication, even if such is not misleading or does not amount to unfair competition. But before the EU could refer to Article 23 TRIPs as the legal basis for the phasing out of Port and Sherry in South Africa, those terms must fall within Article 22 TRIPs of the definition of a geographical indication.

### 5.3.2 Article 22 TRIPs

Article 22 TRIPs defines geographical indications

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<sup>533</sup> Appendix X to the TDCA at [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001); in connection with the phase-out of the terms Port and Sherry, the parties also agreed that the EU will provide a duty-free quota for wines covering the current level of trade of 32 million litres of South African exports to the EU, with allowance for the future growth of this quota. Furthermore the EU will provide assistance to the value of fifteen million Euro for the restructuring of the SA wine and spirits industry.

<sup>534</sup> Interview with Ben van Wyk, Director: Economy and Policy Analysis at the South African National Department of Agriculture (2001-03-23).

<sup>535</sup> WTO Overview: the TRIPs Agreement at [www.wto.org/english/tratop\\_e/TRIPs\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/TRIPs_e/intel2_e.htm) (15.03.2001); Blakeney *Trade Related Aspects of Intellectual Property Rights: A concise Guide to the TRIPs Agreement* (1997) 72.



"as indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin."<sup>536</sup>

The TRIPs agreement has therefore recognised that a geographical indication is a commercially exploitable intangible right with an inherent economic value. The use of a false geographical indication by unauthorized parties could be detrimental to consumers and legitimate producers. The former are deceived and led into believing that they buy a genuine product with specific qualities and characteristics from a specific territory, while they in fact get a "worthless" imitation from a totally different territory than they expected. The latter suffer damage because valuable business is taken away from them and the established reputation of their products is damaged.<sup>537</sup>

The free use of place names is especially important for vintners, since the quality of wine is closely related to where the grapes are grown. Common to all those names is their function of designating existing places, towns, regions or countries.<sup>538</sup> Possibly the most common example of a geographical indication which falls squarely within the definition of Article 22 TRIPs is the term "champagne".<sup>539</sup> In terms of an arrangement with France, the french terms "champagne" and "methode champenoise" may not be applied to wines produced in South Africa. The term "methode cap classique" was created to describe South African sparkling wines made by the "champagne method".

It, however, is not quite as clear that the terms Port and Sherry fall within the definition of geographical indications in terms of Article 22 TRIPs.

EU officials have said that South Africa is cashing in on the reputation of European names. They claim that the word "Port" is derived from the city "Oporto" in Portugal and "Sherry" from the city "Jerez" in Spain. Both names therefore identify the specific

<sup>536</sup> [www.wto.org/english/tratop\\_e/TRIPs\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/TRIPs_e/intel2_e.htm) (15.03.2001).

<sup>537</sup> World Intellectual Property Organization (WIPO) *What is a geographical indication* at [www.wipo.int/about-ip/en/about\\_geographical\\_ind.html](http://www.wipo.int/about-ip/en/about_geographical_ind.html) (15.03.2001); [www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm) (15.03.2001).

<sup>538</sup> [www.wipo.int/about-ip/en/about\\_geographical\\_ind.html](http://www.wipo.int/about-ip/en/about_geographical_ind.html) (15.03.2001).

<sup>539</sup> For further examples, see Blakeney *Trade Related Aspects of Intellectual Property Rights* (1996) 69 and [www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm) (15.03.2001).



product as one originating in a specific area.<sup>540</sup> From the South African point of view, neither is the name of a region or locality in Spain or in Portugal. Both are simply corruptions of the names of particular regions in each country.<sup>541</sup>

Portuguese Port and Spanish Sherry apparently do not necessarily originate in Oporto or Jerez. Portuguese Port is not produced anywhere near the town of Oporto, although it is often aged and blended there. Spanish Sherry is made from grapes in the vicinity of Jerez, but many Sherry producers occupy premises in towns a small distance away. Moreover, it is questionable that the names Port and Sherry are automatically associated internationally with fortified wines of a particular quality which originate in particular regions of Portugal and Spain, respectively. According to an official of the Koöperatiewe Wynbouers Vereniging van Suid-Afrika (KWV), South Africa's largest wine exporter, about 7000 farm workers produce Port and Sherry and about 13% of its 750 million Rand production is exported.<sup>542</sup> This shows that production of Port and Sherry is not popular in Spain and Portugal only and that the association of those products with wines of a certain quality from a particular region cannot be generalized.

Nevertheless, even if it were to be accepted that these names fall within the definition of geographical indications in terms of Article 22 TRIPs, it could not be said that South Africa is in breach of the TRIPs agreement if an exception of Article 24 TRIPs applies.

### 5.3.3 Article 24 TRIPs

Article 24 TRIPs contains a number of exceptions to the protection of geographical indications. These exceptions are of particular relevance in respect of additional protection of geographical indications for wines and spirits.<sup>543</sup>

Articles 24 (4) and (6) of the TRIPs agreement provide that a member of the TRIPs agreement shall not be obliged to prohibit the use of the particular geographical indication if the member has made continuous *bona fide* use of such an indication for

<sup>540</sup> [www.findarticles.com/cf\\_0/m0WXI/1999\\_Feb\\_3/53711311.jhtml](http://www.findarticles.com/cf_0/m0WXI/1999_Feb_3/53711311.jhtml) (15.03.2001).

<sup>541</sup> Hofmeyr "Port and Sherry still under debate" *Farmer's Weekly* (1999-02-12) 38.

<sup>542</sup> [www.dispatch.co.za/1998/09/21/southafrica/SHERRY.HTM](http://www.dispatch.co.za/1998/09/21/southafrica/SHERRY.HTM) (15.03.2001); Honey "EU moots trade-off to break impasse over port and Sherry" *Financial Mail* (1999-01-15) 22.

<sup>543</sup> [www.wto.org/english/tratop\\_e/TRIPs\\_e/intel2\\_e.htm](http://www.wto.org/english/tratop_e/TRIPs_e/intel2_e.htm) (15.03.2001).



at least ten years preceding 15 April 1994 or if the particular geographical indication has in fact become generic in the particular member country and is the customary name for the particular goods.

South Africa has made continuous and bona fide use of the names "Port" and "Sherry". According to the Stellenbosch Farmer's Winery, its "Sedgwick's Old Brown Sherry" label is more than 100 years old and a KWV official has confirmed that South Africa has been producing Sherry and Port wines for three centuries.<sup>544</sup>

Furthermore, one could argue that "Port" and "Sherry" have become generic in South Africa and are used as "customary terms". They would be terms that may have their origin within a certain context, but because of the wide use of the terms outside that context, they have become common to the domestic language, losing all ties with the initial origin of the term. The terms no longer function as geographical indications.<sup>545</sup>

Indeed, it is difficult to imagine an alternative name which could be used for products which have been called "Port" and "Sherry" ever since they were exported by some EU Member States to South Africa during the time of colonization. There is also no misleading or deception of consumers. The South African public harbour no illusions that the "Sherry" and "Port" sold in South Africa originate in Portugal or Spain.<sup>546</sup>

Moreover, South Africa's use of the "Sherry" and "Port" names cannot dilute those names as geographical indications, as they are completely eroded in South Africa already. They have no meaning as geographical indications as defined in terms of Article 22 TRIPs. They fall within the public domain as descriptive terms which cannot be monopolized by any trader, including producers of Spanish Sherry and Portuguese Port.

Since the exceptions of Articles 24 (4) and (6) TRIPs apply, the names "Port" and "Sherry" do not fall within the definition of geographical indications in terms of Article 22 TRIPs. Following these rules, South Africa could not legally be forced by the EU to phase out the names "Port" and "Sherry". Apart from this legal perspective, however, the issue has to be analysed in the context of the TDCA.

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<sup>544</sup> [www.dispatch.co.za/1998/09/21/southafrica/SHERRY.HTM](http://www.dispatch.co.za/1998/09/21/southafrica/SHERRY.HTM) (15.03.2001); Honey "EU moots trade-off to break impasse" *Financial Mail* (1999-01-15) 22.

<sup>545</sup> [www.wipo.int/about-ip/en/about\\_geographical\\_ind.html](http://www.wipo.int/about-ip/en/about_geographical_ind.html) (15.03.2001).

<sup>546</sup> Hofmeyr "Port and Sherry still under debate" *Farmer's Weekly* (1999-02-12) 38.



#### 5.4 Port and Sherry in the context of the TDCA

The TRIPs agreement only provides a series of minimum standards of intellectual property protection to which all members of the WTO must conform.<sup>547</sup>

Article 1 (1) TRIPs provides that the Agreement defines the minimum standards of intellectual property protection, in that members are not obliged to implement more extensive protection in their laws than is required by the TRIPs agreement. Furthermore the article provides that the protection which is conferred, even if more extensive than that required by TRIPs, should not contravene the TRIPs provisions. This article leaves members free to determine the appropriate method of implementing the provisions of the agreement within their own legal systems.

Concerning EU-South Africa trade relations, the parties determined to apply the rules of TRIPs in terms of Article 46 (1) TDCA as a part of the TDCA. Although this might give the impression that it could be preferential for South Africa in the issue concerning Port and Sherry, Article 1 (1) TRIPs leaves the members free to apply more extensive protection than required by TRIPs. Consequently South Africa and the EU could bilaterally go further and even consider Port and Sherry as protected geographical indications.

However, South Africa indicated that the final say on the geographical denominations rests with the WTO under the TRIPs agreement. In the opinion of the South African Minister of Trade, Alec Erwin, the WTO will find the EU-mandated phase-out of the geographical indicators unacceptable under global trade rules, and South Africa will ultimately win the battle over spirits.<sup>548</sup> Furthermore, South Africa is not alone in regard to this issue. Countries like the USA, Canada, Australia, New Zealand and Hungary are also fighting to export their fortified wines under names as "Port" and "Sherry" and are likely to be allies to South Africa.<sup>549</sup> Moreover, it was agreed, in the compromise package on Port and Sherry, that new designations to be used (in the place of "Port" and "Sherry") in South Africa after twelve years would involve joint agreement.<sup>550</sup> The phrasing could be interpreted as providing South Africa with the

<sup>547</sup> [www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm) (15.03.2001); Jackson *The World Trading System* (1998) 312.

<sup>548</sup> [www.ictsd.org/html.weekly/story4.29-02-00.htm](http://www.ictsd.org/html.weekly/story4.29-02-00.htm) (15.03.2001).

<sup>549</sup> Honey "EU moots trade-off to break impasse" *Financial Mail* (1999-01-15); Hofmeyr "Port and Sherry still under debate" *Farmer's Weekly* (1999-02-12) 38.

<sup>550</sup> Annex X to the TDCA at [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001).



possibility of re-negotiating the issue after twelve years and of continuing the use of the names "Port" and "Sherry".

But all possible international support for South Africa from third countries and the ambiguity of the compromise package cannot change the fact that South Africa is bound to its bilateral commitment. This commitment can be interpreted in the light of the Vienna Convention on the Law of Treaties. According to the "Pacta sunt servanda" principle,<sup>551</sup> South Africa will be bound by its commitment to jointly agree on new designations and there is no doubt that this does not allow a return to the old names.

In other words, the terms "Port" and "Sherry", according to the bilateral commitment, will be lost to the South African domestic market in twelve years' time.

### **5.5 Evaluation of the Port and Sherry Compromise**

Many people in Europe indeed associate the Iberian Peninsula with the source of Port and Sherry. Thus the EU's argument with regard to the protection of European geographical indications for wine and spirits may deserve some support.

Regarding the legal circumstances, however, it seems as if South Africa was in a very strong position to object to the phasing out of the two traditional South African brand names. The South African negotiating team nevertheless gave in to European pressure and therefore did not reach its own goal by the end of the negotiations.

The reason for not insisting on the current WTO minimum standards ruling seems to lie more in the nature of the agreement itself, which represents a package of compromises. Consequently, the concessions made by South Africa regarding the issue of brand names cannot only be regarded from a isolated point of view, but has to be judged from an overall perspective. South African politicians and economists, for example, regarded the compromise on the "Port" and "Sherry" issue as necessary and welcomed the signing of the free trade agreement with the EU. In their view the TDCA is a landmark deal creating a free trade zone and adding one per cent per year to South Africa's growth rate.<sup>552</sup> Since the EU is South Africa's most important

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<sup>551</sup> Article 26 of the Vienna Convention on the Law of Treaties.

<sup>552</sup> Moyo "EU-SA Trade pact clinched" *The Namibian* (1999-10-12) 1.



trading partner, South Africa obviously regarded the retention of the Port and Sherry designations as a less important issue compared to the overall agreement and clearly aimed for more important gains in other fields.

However, one must bear in mind that the respective names do not qualify as geographical indications and that South Africa's commitment in this case may not be seen as a precedent under TRIPs for further trade negotiations between the EU and other ACP countries. The EU took rather too great an advantage of its strong position in the negotiations and South Africa's position therefore has to be regarded as a compromise with the overall trade package.

Moreover, the question remains how to judge European negotiating policy towards its trading partner. It is true that the TDCA allows South Africa to receive an amount of 15 million Euro for the phasing out of the two labels,<sup>553</sup> but a monetary compensation does not make up for losing rights to the Port and Sherry names. Furthermore, the question of who would receive this money, and what amounts would be allocated to which sectors of the industry, still requires attention.

In addition to that financial matter, the dispute between the EU and South Africa might have damaged European-South African relations and might have harmed future EU credibility with developing countries. Highlighting the importance of the issue for South Africa, former President Nelson Mandela warned in a letter to the EU that "for ordinary people, such an agreement cannot be concluded by us surrendering the household in southern Africa of our own Port and Sherry".<sup>554</sup> Trade Minister Erwin complained that the EU had broken every agreement reached in the last eighteen months before the conclusion of the TDCA. South African trade officials even saw a dangerous precedent for developing countries dealing with the EU in the EU's negotiating tactics.<sup>555</sup>

South Africa in fact is not alone in concluding trade agreements with the EU. Free trade agreements with Morocco, Tunisia and Egypt include only limited concessions in agriculture and Hungary, Cyprus, Australia and Switzerland were required to phase

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<sup>553</sup> See Appendix X to the TDCA at [www.europa.eu.int/eur.lex/en/treaties/dat/ec\\_cons\\_treaty\\_en.pdf](http://www.europa.eu.int/eur.lex/en/treaties/dat/ec_cons_treaty_en.pdf) (21.02.2001).

<sup>554</sup> Honey "EU moots trade-off to break impasse" *Farmers Weekly* (1999-01-15) 22.

<sup>555</sup> [www.ictsd.org.html.weekly/story4.29-02-00.htm](http://www.ictsd.org.html.weekly/story4.29-02-00.htm) (15.03.2001).



out their use of the terms "Sherry" and "Champagne" in order to sign trade agreements with the EU.<sup>556</sup>

With regard to those examples, one has to admit that the nature of the EU's strategy to use regional trade agreements to introduce new "protectoral measures" is rather alarming, because it constitutes proof that free trade agreements may negatively affect multilateral efforts towards trade liberalisation.

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<sup>556</sup> Obeng & Mc Gowan "The EU-SA FTA" *SAJII* (1999) 105.



## 6. Conclusion

The apartheid regime resulted in South Africa being found empty-handed economically, as far as international agreements were concerned, with regard to trade, as well as in the sphere of cooperation. The start of negotiations towards an agreement with the EU therefore provided South Africa with an excellent opportunity to find its way back into the global economy.

However, the negotiations with the EU turned out to be more complicated and complex than anyone had expected. The reason for this was the totally different expectations of the two negotiating parties. On the one hand, South Africa took the "poor man" line and tried to convince the EU that it forms part of a poor region in desperate need of development aid. South Africa therefore preferred to become a member of the Lomé Convention, instead of entering into a free trade agreement with the EU on a reciprocal basis.<sup>557</sup> On the other hand, the EU had the intention of starting a new future cooperation with the ACP countries. This could be reached through individual bilateral agreements with each of the ACP states and the splitting of the Lomé Convention into regional agreements. With regard to South Africa, the EU wanted to form a new long-term trade relationship with South Africa on a reciprocal basis. Therefore the EU was unwilling to allow South Africa's accession to the Lomé Convention.<sup>558</sup> However, in analyzing the EU position, one has to bear in mind that the EU is not a monolithic bloc of countries, but comprises fifteen Member States that sometimes have very different interests, which are sometimes hard to reconcile.<sup>559</sup> The EU, furthermore, is undergoing a series of radical reforms with regard to its financing and farming and regional spending, and is confronted with the future enlargement of the EU towards Eastern Europe. The enlargement towards Eastern Europe is a huge and difficult task for the EU and the EU might by then focus more on its own problems than on accommodating the interests of African countries. In the future it might therefore be difficult for the ACP countries to win concessions from the EU.

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<sup>557</sup> See Chapter 2.2.

<sup>558</sup> See Chapters 2.3.2 and 2.9.3.2.

<sup>559</sup> This, for example, became apparent during the negotiations of the Wine and Spirits Agreement. See Chapter 2.11.



Nevertheless, the TDCA between the EU and South Africa elevates the existing relationship to a higher level and provides South Africa with a formalized relationship with the world's biggest trading bloc. This places South Africa in a special and privileged relationship with the EU when compared to many other countries. Furthermore, it confirms South Africa's position as a credible player on the global stage and it sends out the message that South Africa is willing to be considered and to negotiate as a "developing state wanting to become developed" rather than being grouped with the other ACP countries. With regard to further trade relations between the EU and other ACP countries in the future, the political significance of the TDCA should not be underestimated. It might serve as an indicator of how relations are likely to develop and South Africa, as the new trading partner of the EU, has become a significant influence for promoting development in the ACP countries.

In terms of commercial opportunities, it is to be acknowledged that the TDCA provides South Africa with significant market access into the huge European market. The inclusion of three-quarters of South Africa's agricultural exports is a major achievement for Pretoria's negotiators and a unique commitment on the EU side.

Concerning the developmental character of the agreement, the TDCA confirms that the EU will continue to assist South Africa in important areas of developmental need. This becomes clear in the Science and Technology Agreement, in the clause relating to political dialogue between the two parties and in the clause of good governance, as well as in social and cultural cooperation.

However, one of the shortcomings of the TDCA is that the EU did not adequately consider the fact that the agreement with South Africa might have a significant impact on the whole Southern African region. In the case of SACU, for example, the agreed tariff reductions within the TDCA between the EU and South Africa involves a significant reduction in revenue for the BLNS countries due to their dependence on the common fund. This is likely to have serious budgetary implications for the BLNS countries and to lead to disputes concerning regional interests.<sup>560</sup>

While disputes concerning regional interests are to be dealt with by the WTO Dispute Settlement Bodies, the bilateral disputes between the EU and South Africa are to be dealt with by the Cooperation Council. This Cooperation Council is responsible for consultation and mediation between the partners and its decisions could also have an impact on the neighbouring Southern African countries. However, until now its

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<sup>560</sup> See Chapter 4.2.2.1.



composition does not reflect those regional interests and thus needs to be addressed constructively in future talks between the parties.<sup>561</sup>

Concerning intellectual property rights, both parties accepted the application of the TRIPs Agreement. In addition, South Africa agreed to the EU demand not to use the names "Port" and "Sherry" for its exports to the EU and to phase out the names on all export markets within five years, except in the case of non-SACU SADC countries, where an eight-year phase-out period would apply. On the domestic market (covering SACU) South Africa will phase out the names "Port" and "Sherry" during the twelve-year transition period. There was no legal obligation to do so under TRIPs, however, because the respective names do not qualify as "geographical indications". South Africa's commitment in this respect may not be seen as a precedent under TRIPs, but rather as a compromise within the overall trade package.

Furthermore, the dispute between the EU and South Africa on the Port and Sherry issue might have harmed future EU credibility with developing countries. One has to admit that the nature of the EU strategy to use regional trade agreements to introduce new measures is rather alarming, because it constitutes a proof that free trade agreements may negatively affect the multilateral efforts towards trade liberalisation.

With regard to the GATT/WTO provisions, both the EU and South Africa are bound by the GATT and the WTO's rules governing preferential trade relations.<sup>562</sup> Concerning a deviation by the EU and South Africa from the MFN obligation, this seems to be justified under Article XXIV GATT, as Article XXIV GATT provides that the TDCA substantially liberalizes about 90% of the trade involved and the interim agreement leading to the formation of the free trade area includes a plan and a schedule for the formation of such an area within a "reasonable length of time". Furthermore, the EU and South Africa sought the necessary formal approval of the contracting parties of the WTO.<sup>563</sup> Thus the TDCA between the EU and South Africa

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<sup>561</sup> See Chapters 3.1.8.2 and 3.2.

<sup>562</sup> As explained in Chapter 4.2.1, the MFN clause obliges each WTO member to extend most-favoured-nation treatment to all other states that are party to the agreement. The WTO framework, however, provides exceptions to the MFN obligation (eg Article XXIV GATT) which justify preferential trade relations between WTO members.

<sup>563</sup> The TDCA is still under examination by the WTO.



in principle complies with the prerequisites of Article XXIV GATT. The need to meet these prerequisites is definitely one of the main reasons why the final outcome of the TDCA is rather modest, compared to what South Africa had expected at the beginning.<sup>564</sup> The EU was not willing to jeopardize its aim of WTO compatibility by allowing a greater degree of non-reciprocity.

The importance that the EU attached to the compatibility of the TDCA with the GATT/WTO provisions throughout the negotiations is notable. The disputes with Latin America and the USA, particularly over the banana regime of the Lomé Convention,<sup>565</sup> clearly had some effect. The EU now seems to be much more cautious than it used to be in ensuring that its trade agreements with other countries comply with the GATT/WTO provisions.

Concerning the impact of the TDCA on economic development in South Africa, one has to bear in mind that the agreement only provides a legal framework for bilateral trade relations between the EU and South Africa. Therefore the outcomes of the TDCA are not predetermined. The realization of the objectives of the TDCA depends on the South African government, which has to ensure that industries in South Africa

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<sup>564</sup> See Chapter 2.5.

<sup>565</sup> The EU is the world's largest consumer of bananas and for that reason is considered a lucrative market. In deciding to harmonise the different regimes on the importation of bananas, the EEC introduced a common banana regime in 1993, under Council Regulation 404/93. This regime replaced the previous system of national arrangements, which provided mostly open access to the European market for Latin American bananas and shipping services, with the exception of France, Spain, Italy, Portugal and the UK. Referring to Article 30 ECT as the legal basis for the exception of the free movement of goods, the new regime introduced a complex, restrictive and discriminatory system of measures. These measures favoured EU and ACP producers and EU suppliers, but caused injury to Latin American and US banana producers and some EU service providers.

Five Latin American countries requested the establishment of a GATT panel to investigate their complaints. In a 1993 Report, the panel found that the quantitative restrictions applied by Spain, France, Italy, Portugal and the UK were inconsistent with the obligation to eliminate such restrictions under Article XI (1) GATT. It also found that the tariff preferences were inconsistent with the MFN clause and that a legal justification for the latter preferences did not emerge from Article XXIV GATT. However, the EEC refused to adopt this report, arguing that these conclusions raised a major problem not only for them, but also for their non-reciprocal preferential agreements with developing countries, especially the ACP.

In July 1993, the EEC established its common regime for bananas. The five Latin American countries therefore requested a WTO Dispute Settlement Panel to examine the matter in terms of Article XXIII (1) GATT. The EEC argued that the preferential treatment granted the ACP under the Lomé Convention was justifiable under Article XXIV (7) GATT in the light of Part IV GATT, as the Lomé Convention was a free trade area agreement. In its finding against the EEC, the Dispute Settlement Panel recognized the violations of Articles I (1), II (1) and III (4) GATT. They disallowed the justification under Article XXIV GATT. After appealing against the findings in 1997, the EU Agriculture Council adopted modifications to its banana measures and unilaterally declared these to be WTO consistent in June 1998.



are made aware of the potential benefits and dangers of the agreement, and on the performance of South Africa's economy itself. Producers have to take cognizance of the new economic relations under the TDCA and restructure their companies and sectors accordingly in order to benefit from the new trade relationship.

I believe, however, that the EU-SA TDCA is part of the process of re-positioning and re-integrating South Africa into the changing world economy, and that it will contribute to the process of developing more globally competitive patterns of production in South Africa. In my opinion it therefore provides South Africa with an important opportunity for economic growth and development.

In considering the EU-SA agreement from a global point of view, the question that remains to be answered is whether the TDCA could serve as an example for future trade relations between the EU and the ACP countries.

A first step towards taking the EU-SA TDCA as a model for further EU-ACP trade relations has already been taken by means of the conclusion of the Cotonou Agreement between the EU and ACP countries in February 2000. The Cotonou Agreement *inter alia* provides a framework for supporting the mutually reinforcing effects of trade cooperation and development aid. The EC and the ACP states have therefore agreed on a process to establish new trading arrangements, the so-called Regional Economic Partnership Agreements (REPAs), which will pursue trade liberalisation between the parties and formulate conditions with regard to trade-related matters.<sup>566</sup>

As explained above,<sup>567</sup> these REPAs will replace existing non-reciprocal trade preferences that will follow an eight-year transition period lasting from 2000 to 2008. An application for a waiver from the WTO for this period has already been filed in Geneva. The REPAs would be entered into with different ACP regions or countries. Essentially, they would be free trade area arrangements, but with added benefits for the ACP countries, and would include provisions for economic cooperation. In principle, ACP partners in the REPAs would retain their current preferential access to

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<sup>566</sup> EU COM *The new ACP-EU Agreement* (2000) 7.

<sup>567</sup> See Chapter 2.12.



European markets, but would have to reciprocate by progressively opening up their own markets to European imports on a preferential basis.<sup>568</sup>

The EU and the ACP countries thus concluded an agreement that provides for the establishment of free trade area arrangements. The successful negotiation of the TDCA between the EU and South Africa could be interpreted as a green light to REPAs. It appears rather doubtful, however, whether it could really serve as an example for REPAs.

First, the initial economic and institutional conditions in South Africa and the ACP countries are very different. The South African economy is more extensive, more industrialized and more diversified than any of the other ACP economies. In the WTO, South Africa is considered as a developed country, while all other ACP countries are developing or least developed. The bigger development gap between them and the EU makes it more difficult to reach a reciprocal agreement that would benefit all parties rapidly. Besides, the effort and human resources required to negotiate a free trade agreement with the EU should also not be underestimated.<sup>569</sup> One has to bear in mind that it took the EU and South Africa 43 months and 21 rounds of negotiations to conclude the TDCA. During this time, both parties had to gather the necessary information to formulate their proposals. South Africa, for example, initiated a process of domestic and regional consultation to formulate its own mandate for negotiations with the EU in 1996. This process involved consultations with the other SACU and SADC member states and intensive research on the impact of the agreement on trade and economic development in South and Southern Africa.<sup>570</sup> Most of the ACP countries, especially in Africa, have less capacity than South Africa to negotiate and implement a complex bilateral trade agreement with the EU.<sup>571</sup>

Second, signing a free trade agreement is largely a matter of political will. Regions that have made progress with regard to their political and economic integration by successfully concluding trade liberalisation agreements that brought down barriers between members had strong political motives to do so.<sup>572</sup> In this respect, it seems

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<sup>568</sup> EU COM *Partnership for the new millennium* (2000) 4-5; See Chapter 2.12.

<sup>569</sup> Davies *Forging a new relationship* (2000) 14.

<sup>570</sup> Mills "Free Trade with the EU" *SAYIA* (1996) 46; See Chapter 2.4.1.

<sup>571</sup> Solignac Lecomte *The impact on Lomé* (2000) 66.

<sup>572</sup> The EEC, for instance, was established in order to ensure a peaceful European Continent.



that South Africa's motives were different from those of the ACP countries, and were arguably stronger. At the time when South Africa started negotiating with the EU, its motives were of a dual nature. On the political side there was the desire to return to the international scene. On the economic side, South Africa needed to find a way to improve its access to the markets of developed economies and reach beyond MFN treatment. Since, in the case of the EU, it could obtain non-reciprocal Lomé preferences,<sup>573</sup> a bilateral free trade agreement represented a substantial improvement. Moreover, opening up the economy beyond WTO-bound tariff levels could be seen as part of a strategy aimed at restructuring a very protected economy, particularly in the industrial sector.<sup>574</sup>

Most ACP countries find themselves in a very different situation. The political impetus that pertained to the EU-SA deal does not apply in the case of the ACP countries. Economically, most of the ACP countries, when compared to South Africa, do not have a very developed industrial sector and expect gains in agricultural rather than in industrial products. Furthermore, signing a reciprocal trade agreement could mean significant adjustment costs to them and would not offer any substantial improvement in terms of market access when compared to the former Lomé Convention.

Thus, since South Africa was politically and economically active in concluding a free trade agreement with the EU, its situation cannot be compared to that of the ACP countries. This arguably provides a weaker basis for the successful negotiation and completion of ambitious and complex free trade agreements.<sup>575</sup>

However, alternative suggestions are hard to come by, as the preferences granted by the Lomé Convention are considered violations of WTO rules – as was proved by the banana dispute surrounding preferential treatment of ACP bananas on the European market. It therefore seems that the ACP countries increasingly have to accept reciprocity as the cornerstone of their regional economic agreements with the EU.

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<sup>573</sup> The EU offered South Africa a qualified membership of the Lomé Convention, as well as a bilateral FTA in its two-track proposal of June 1995. South Africa's qualified membership of the Lomé Convention means that only certain articles of the Lomé Convention are applicable to South Africa. See Chapters 2.3.2 and 2.9.3.

<sup>574</sup> Solignac Lecomte *The impact on Lomé* (2000) 66.

<sup>575</sup> Davies *Forging a new relationship* (2000) 15; Solignac Lecomte *The impact on Lomé* (2000) 67.



If the ACP countries consider entering into free trade area agreements with the EU, some lessons should be learnt from the SA-EU TDCA, even though the situation of the ACP countries is very different from that of South Africa.

Since the ACP countries currently lack negotiating capacity, they should bargain for substantial human and financial resources during the negotiations if they want to extract some meaningful concessions from the EU. The EU has offered technical assistance in conducting the negotiations to the ACP countries. With regard to the time frame, there must be some built-in flexibility of time frames for liberalisation. The ACP countries must negotiate a longer transitional period. They, however, cannot expect much assistance from the EU in addressing their structural rigidities within this period.<sup>576</sup> According to the WTO, the normal transitional period for the establishment of a free trade area is ten years and, in exceptional cases, twelve years.<sup>577</sup> During the negotiations, the ACP countries should furthermore focus on those products that they are interested in. Mauritius, for example, would be interested in retaining the sugar protocol<sup>578</sup> and market access for textiles and clothing, while it may be prepared to reciprocate in favour of the EU in a number of other areas.<sup>579</sup>

These are some suggestions relating to the idea of "new economic regional agreements" between the ACP countries and the EU. As the EU-SA TDCA has already shown, it will be very difficult to conclude agreements with the ACP countries within the ambitious time frame of the Cotonou Agreement. The partnership between the EU and the ACP countries needs a new perspective to help ACP countries to play a more meaningful role in world trade, though. At this stage it is too early to judge whether and how the REPAs will work, but regional trading arrangements are a key to economic success and the continued survival of regions, and should therefore be introduced between the EU and the ACP countries.

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<sup>576</sup> Tekere "Implications of EU-SA TDCA" *IGD Occasional Paper No 24* (2000) 72.

<sup>577</sup> See Chapter 4.2.1.4.1.2.

<sup>578</sup> Four additional protocols for sugar, beef and veal, rum and bananas were attached to the Lomé Convention. These protocols gave free access to EU markets for a fixed quantity of exports from selected and traditional suppliers. The sugar protocol was annexed to the Lomé Convention in 1975, but is not an integral part of it. Its separate status implied that its future is independent of the continuation of the Lomé Convention See Chapter 2.2.2.

<sup>579</sup> Tekere "Implications of EU-SA TDCA" *IGD Occasional Paper No 24* (2000) 77.



**GLOSSARY**

<b>€</b>	Euro
<b>ACP</b>	African, Caribbean, Pacific countries
<b>ANC</b>	African National Congress
<b>BC Net</b>	Business Cooperation Network
<b>Benelux</b>	Belgium, Netherlands, Luxemburg
<b>BLNS</b>	Botswana, Lesotho, Namibia, Swaziland
<b>CAP</b>	Common Agricultural Policy
<b>CBI</b>	Cross Border Initiative
<b>CFSP</b>	Common Foreign and Security Policy
<b>COSATU</b>	Congress of South African Trade Unions
<b>CTH</b>	Change of Tariff Heading
<b>DBSA</b>	Development Bank of Southern Africa
<b>DG VIII</b>	Directorate General Development
<b>DSU</b>	Dispute Settlement Understanding
<b>DTI</b>	Department of Trade and Industry
<b>EC</b>	European Community



<b>ECIP</b>	European Community Investment Partners
<b>ECJ</b>	European Court of Justice
<b>ECT</b>	European Community Treaty
<b>ECU</b>	European Currency Unit
<b>EDF</b>	European Development Fund
<b>EEC</b>	European Economic Community
<b>EIB</b>	European Investment Bank
<b>EPRD</b>	The European Programme for Reconstruction and Development in South Africa
<b>EPWE</b>	Europäisches Programm für Wiederaufbau und Entwicklung
<b>EU</b>	European Union
<b>FGD</b>	Foundation for Global Dialogue
<b>FTA</b>	Free Trade Area
<b>GATS</b>	General Agreement on Trade in Services
<b>GATT</b>	General Agreement on Tariffs and Trade
<b>GATT 1947</b>	GATT concluded in 1947



<b>GATT 1994</b>	GATT incorporated into the 1994 Agreement on the WTO
<b>GDP</b>	Gross Domestic Product
<b>GNP</b>	Gross National Product
<b>GSP</b>	Generalised System of Preferences
<b>IGD</b>	Institute for Global Dialogue
<b>IPD</b>	Institute for Political Dialogue
<b>KWV</b>	Koöperatiewe Wynbouers Vereniging van Suid-Afrika
<b>LDC</b>	Least Developed country
<b>MFN</b>	Most Favoured Nation
<b>MIP</b>	Multi-Annual Indicative Programme
<b>NAFTA</b>	North American Free Trade Agreement
<b>NGO</b>	Non – Governmental Organisation
<b>R</b>	South African Rand
<b>RDP</b>	Reconstruction and Development Programme
<b>REPAs</b>	Regional Economic Partnership Agreements



<b>RSA</b>	Republic of South Africa
<b>SACU</b>	Southern African Customs Union
<b>SADC</b>	Southern African Development Community
<b>SADCC</b>	Southern African Development Cooperation Conference
<b>SAJII</b>	South Africa Journal of International Affairs
<b>SAYII</b>	South African Yearbook of International Affairs
<b>STABEX</b>	System for the Stabilisation of Export Earnings for Agricultural Products
<b>SYSMIN</b>	System for the Stabilisation of Export Earnings for Mining Products
<b>TDA</b>	Trade and Development Agreement
<b>TDCA</b>	Trade, Development and Cooperation Agreement
<b>TRIMs</b>	Trade Related Investment Measures
<b>TRIPs</b>	Trade-Related Aspects of Intellectual Property Rights
<b>UNDP</b>	United Nation's Development Programme's



<b>USA</b>	United States of America
<b>WIPO</b>	World Intellectual Property Organization
<b>WSA</b>	Wirtschafts – und Sozialausschuss
<b>WTO</b>	World Trade Organization



## APPENDIX

### Appendix 1: Article 19 (1) of the SACU agreement

A contracting party shall not, without the prior concurrence of the other contracting parties and subject to such conditions as may be agreed upon by the contracting parties, enter separately into or amend a trade agreement with a country outside the customs area in terms of which concessions on the duties in force in the common customs area are granted to that country.

### Appendix 2: 1997 - 1999 Multi-annual Indicative Programme

	Total Indicative Programmable Allocation	Channels of Implementation (Indicative % Allocations)	
		Government	Agents of Decentralised Coop.
<b>Focal Areas</b>			
1. Basic Social Services	50 - 60%		
<ul style="list-style-type: none"> <li>Sector Support Programme for Health &amp; Education</li> </ul>	40 - 50%	100%	-
<ul style="list-style-type: none"> <li>Other Activities</li> </ul>	10 - 20%	50%	50%
2. Private Sector Development	15 - 20%	50%	50%



3. Good Governance and Democratization	15 - 20%	50%	50%
<b>Other Areas</b>			
4. Regional Cooperation	+/- 5%	100%	-
5. Unallocated	+/- 5%	50%	50%

### Appendix 3: EU grants under the EPRD on a yearly basis

YEAR	N° of PROJECTS	COMMITMENT (Euro)
1994	97	102,147,282
1995	17	123,320,821
1996	17	129,500,000
1997	11	127,500,000
1998	16	127,500,000
1999	12	127,500,000
<b>TOTAL</b>	<b>170</b>	<b>737,468,103</b>

EPRD 1995-1999 - BREAKDOWN BY SECTOR			
Sector	Allocation Euro	% of total	% foreseen in MIP
<b>TOTAL ALLOCATION FOR 1995</b>	<b>123,320,000</b>		



<b>Basic social services:</b>	<b>97,320,000</b>	<b>78.92%</b>	
Education & training	19,800,000	16.06%	
Health	2,970,000	2.41%	
Water supply	18,000,000	14.60%	
Other	56,550,000	45.86%	
<b>Private sector development</b>	<b>11,000,000</b>	<b>8.92%</b>	
<b>Good governance</b>	<b>15,000,000</b>	<b>12.16%</b>	
<b>TOTAL ALLOCATION FOR 1996</b>	<b>129,211,100</b>		
<b>Basic social services:</b>	<b>84,006,000</b>	<b>65.01%</b>	
Education & training	36,406,000	28.18%	
Health	3,100,000	2.40%	
Water supply	5,000,000	3.87%	
Other	39,500,000	30.57%	
<b>Private sector development</b>	<b>8,907,000</b>	<b>6.89%</b>	
<b>Good governance</b>	<b>35,198,000</b>	<b>27.24%</b>	
<b>Regional</b>	<b>1,100,100</b>	<b>0.85%</b>	
<b>TOTAL ALLOCATION FOR 1997</b>	<b>127,500,000</b>		
<b>Basic social services:</b>	<b>89,200,000</b>	<b>69.96%</b>	50-60
Education and training	58,800,000	46.12%	40-50
Health	22,500,000	17.65%	
Other	7,900,000	6.20%	10-20
<b>Private sector development</b>	<b>17,000,000</b>	<b>13.33%</b>	15-20
<b>Good governance</b>	<b>18,200,000</b>	<b>14.27%</b>	15-20
<b>Other</b>	<b>2,800,000</b>	<b>2.20%</b>	5
<b>Regional</b>	<b>300,000</b>	<b>0.24%</b>	5
<b>TOTAL ALLOCATION FOR 1998</b>	<b>127,500,000</b>		
<b>Basic social services:</b>	<b>73,000,000</b>	<b>57.25%</b>	50-60
Education and training	50,300,000	39.45%	40-50
Health	4,300,000	3.37%	
Water supply and sanitation	18,400,000	14.43%	10-20



Private sector development	13,900,000	10.90%	15-20
Good governance	36,910,000	28.95%	15-20
Regional	3,690,000	2.89%	5
<b>PROJECTED ALLOCATION FOR 1999</b>	<b>125,000,000</b>		
Basic Social Services		53.00%	50-60
Private Sector Development		10.00%	15-20
Good Governance		30.00%	15-20
Regional		7.00%	5
<b>TOTAL MIP ALLOCATION 1996-1999</b>	<b>509,211,100</b>		
Basic social services		61.36%	50-60
Private sector development		10.27%	15-20
Good governance		25.10%	15-20
Other		0.55%	5
Regional		2.72%	5

#### Appendix 4: Coverage of the Free Trade Area

	<b><i>Agriculture</i></b>	<b><i>Industry</i></b>	<b><i>Total</i></b>
<b>South Africa</b>	81, 0 %	86, 5 %	86, 3 %
<b>European Union</b>	61, 4 %	99, 98 %	94, 9 %



### Appendix 5: Exclusion of sensitive products

<b>Main Products excluded at EU side</b> <b>(list to be periodically reviewed)</b>	<b>Main products excluded at SA side</b> <b>(list to be periodically reviewed)</b>
<ul style="list-style-type: none"> <li>• Beef</li> <li>• Sugar</li> <li>• Some dairy (incl. milk, butter, whey)</li> <li>• Maize and maize products</li> <li>• Rice and rice products</li> <li>• Starches</li> <li>• Some cut flowers</li> <li>• Some fresh fruits</li> <li>• Prepared tomatoes</li> <li>• Some prepared fruits and fruit juices</li> <li>• Vermouth</li> <li>• Ethyl alcohol</li> <li>• Some fish</li> </ul>	<ul style="list-style-type: none"> <li>• Beef</li> <li>• Sugar</li> <li>• Some dairy (incl. milk, butter)</li> <li>• Sweet corn</li> <li>• Maize and maize products</li> <li>• Barley and barley products</li> <li>• Wheat and wheat products</li> <li>• Starches</li> <li>• Chocolate</li> <li>• Ice cream</li> </ul>
<ul style="list-style-type: none"> <li>• Unwrought aluminium</li> </ul>	<ul style="list-style-type: none"> <li>• Petroleum and petroleum products</li> <li>• Some chemical products</li> <li>• Some textiles</li> <li>• Automotive</li> </ul>
<p>Total of 304 tariff positions, representing  <b>3.4 % of total imports from SA</b></p>	<p>Total of 120 tariff positions, representing  <b>10.9 % of total imports from EU</b></p>



### Appendix 6: Partial liberalisation of products

Main products offered for partial liberalisation at EU side	Main products offered for partial liberalisation at SA side
<ul style="list-style-type: none"> <li>• Several cut flowers (roses, orchids, chrysanthemums, proteas – 1,6 tons per year, half duty)</li> <li>• Strawberries (250 tons per year, duty-free)</li> <li>• Several canned fruits (60000 tons per year, half duty)</li> <li>• Several fruit juices (5700 tons per year, half duty)</li> <li>• Wines (32 million litres per year, duty-free)</li> </ul>	<ul style="list-style-type: none"> <li>• Footwear and leather (gradual tariff reduction, end-rate 10 or 20 %)</li> <li>• Some automotive (gradual tariff reduction, end-rate 6-11 %)</li> <li>• Several textiles and clothing (gradual tariff reduction, end-rate 5-20%)</li> <li>• Tyres (gradual tariff reduction, end-rate 10-15%)</li> </ul>
Total of 44 tariff positions, representing <b>1.7 % of total imports from SA</b>	Total of 2011 tariff positions, representing <b>2.8 % of total imports from the EU</b>



## **Appendix 7: Protocol 3 of the Cotonou Agreement**

### **ARTICLE 1**

#### **Qualified Status**

1. The participation of South Africa in this Agreement is subject to the qualifications set out in this Protocol.
2. The provisions of the bilateral Agreement on Trade, Development and Cooperation between the European Community, its Member States and South Africa signed in Pretoria on 11 October 1999, hereinafter referred as the "TDCA", shall take precedence over the provisions of this Agreement.

### **ARTICLE 2**

#### **General Provisions, Political Dialogue and Joint Institutions**

1. The general, institutional and final provisions of this Agreement shall apply to South Africa.
2. South Africa shall be fully associated in the overall political dialogue and participate in the joint institutions and bodies set out under this Agreement. However, in respect of decisions to be taken in relation to provisions that do not apply to South Africa under this Protocol, South Africa shall not take part in the decision-making process.



## ARTICLE 3

### Cooperation Strategies

The provisions on cooperation strategies of this Agreement shall apply to cooperation between the Community and South Africa.

## ARTICLE 4

### Financial Resources

1. The provisions of this Agreement on development finance cooperation shall not apply to South Africa.
2. However, in derogation from this principle, South Africa shall have the right to participate in the areas of ACP-EC development finance cooperation listed in Article 8 below, on the understanding that South Africa's participation will be fully financed from the resources provided for under Title VII of the TDCA. Where resources from the TDCA are deployed for participation in operations in the framework of ACP-EC financial cooperation, South Africa will enjoy the right to participate fully in the decision-making procedures governing implementation of such aid.
3. South African natural or legal persons shall be eligible for award of contracts financed from the financial resources provided for under this Agreement. In this respect, South African natural or legal persons shall, however, not enjoy the preferences accorded to natural and legal persons from ACP States.

## ARTICLE 5

### Trade Cooperation



1. The provisions of this Agreement on economic and trade cooperation shall not apply to South Africa.

2. Nonetheless, South Africa shall be associated as an observer in the dialogue between the Parties pursuant to Articles 34 to 40 of this Agreement.

## ARTICLE 6

### Applicability of Protocols and Declarations

The protocols and declarations annexed to this Agreement that relate to parts of the Agreement that are not applicable to South Africa, shall not apply to South Africa. All other declarations and protocols shall apply.

## ARTICLE 7

### Revision Clause

This Protocol may be revised by decision of the Council of Ministers.

## ARTICLE 8

### Applicability

Without prejudice to the previous articles, the table hereunder sets out those articles of the Agreement and its Annexes which shall apply to South Africa and those which shall not apply. This Article is followed by a table:



<i>Applicable</i>	<i>Remarks</i>	<i>Not applicable</i>
Preamble		
Part I, Title I, Chapter 1: <i>"Objectives, principles and actors"</i> (Articles 1 to 7)		
Part I, Title II, <i>"The political dimension"</i> ; Articles 8 to 13		
Part 2, <i>"Institutional provisions"</i> ; Articles 14 to 17	<i>In accordance with Article 1 of this protocol, South Africa shall not have voting rights in any of the joint institutions or bodies in areas of the Agreement which are not applicable to South Africa.</i>	
Part 3, Title I, <i>"Development strategies"</i> .		
	<i>In accordance with Article 5 above, South Africa shall be associated as an observer in the dialogue between the Parties pursuant to Articles 34 to 40.</i>	Part 3, Title II, <i>Economic and Trade Cooperation.</i>
Article 75(i) ( <i>Investment promotion, support for the ACP-EU private sector dialogue on regional level</i> ), Article 78 ( <i>Investment protection</i> )	<i>In accordance with Article 4 above, South Africa shall have the right to participate in certain areas of development finance cooperation on the understanding that such participation will be fully financed from the resources provided for under Title VII of the TDCA.</i>  <i>In accordance with Article 2 above, South Africa may participate in the ACP-EC Development Finance Cooperation Committee provided for in Article 83, without enjoying voting rights in relation to provisions that do not apply to South Africa.</i>	Part 4, <i>Development Finance Cooperation</i>



Part 5, <i>General Provisions for the Least Developed, Landlocked and Island ACP States</i> , Articles 84 to 90		
Part 6, <i>Final Provisions</i> , Articles 91 to 100		
		Annex I (Financial Protocol)
Annex II, <i>Terms and conditions of Financing</i> , Chapter 5 (link to Article 78 / investment protection)	<i>In accordance with Article 4 above, South Africa shall have the right to participate in certain areas of development finance cooperation on the understanding that South Africa's participation will be fully financed from the resources provided for under Title VII of the TDCA.</i>	Annex II, <i>Terms and conditions of Financing</i> , Chapters 1, 2, 3 and 4
Annex III <i>Institutional Support (CDE and CTA)</i>	<i>In accordance with Article 4 above, South Africa shall have the right to participate in certain areas of development finance cooperation on the understanding that South Africa's participation will be fully financed from the resources provided for under Title VII of the TDCA.</i>	



<p>Annex IV, <i>Implementation and Management Procedures:</i></p> <p>Articles 6 to 14, (<i>Regional cooperation</i>)</p> <p>Articles 20 to 32 (<i>Competition and preference</i>)</p>	<p><i>In accordance with Article 4 above, where resources from the TDCA are deployed for participation activities in the framework of ACP-EC financial cooperation, South Africa will enjoy the right to fully participate in the decision-making procedures governing implementation of such aid. South African natural and legal persons will moreover be eligible for participation in tenders for contracts financed from the financial resources of the Agreement. In this context, South African tenderers will not enjoy the preferences provided for tenderers from the ACP States.</i></p>	<p>Annex IV, Articles 1 to 5 (<i>national programming</i>); 15 to 19 (<i>provisions relating to the project cycle</i>), 27 (<i>preference to ACP contractors</i>) and 34 to 38 (<i>Executing agents</i>)</p>
		<p>Annex V / trade regime during the preparatory period.</p>
<p>Annex VI; List of Least Developed, island and landlocked ACP States.</p>		



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